A

TREATISE

ON THE

DEED OF ENTAIL,

EMBRACING,

COMMENTARIES

ON THE AMENDMENT ACT OF 1848, AND PRIOR ACTS ON THE SUBJECT OF

ENTAILS.

WITH

AN APPENDIX,

CONTAINING THE ACTS, FORMS OF THE DEED, &c.

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PREFACE.

THE great and important changes produced by the recent Statute on the law and practice connected with Entails, have laid on me the duty of revising the Chapter on the Deed of Entail contained in my Treatise on FEUDAL CONVEYANCING. In adding to the work a Commentary on the Statutes, and more particularly on the Act of the late Session of Parliament, which contains so many provisions of a highly complex kind, I was not insensible to the difficulty of the task, but ventured to rely on a continuance of that indulgence with which the Profession have received my former endeavours to assist in the application of important Statutes to practice.

The references to cases contained in the *New Series* of Court of Session Reports, are marked by the letters N. S. In other respects, authorities are referred to as in my former works.

In commenting on the numerous Acts relating to the subject of Entails, I have availed myself of the mode already in some measure in use, of referring to the particular Act by the title or name of the Peer or Member of Parliament by whom it was promoted. For the liberty I have thus taken, the great convenience of the method will, I trust, be my excuse.

EDINBURGH,
6*th October* 1848.

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ed, and failed in restraining a series of heirs. At length the ingenuity of the feudal lawyers of the time invented those clauses styled irritant and resolutive, whereby not only were the debts and deeds of the heir in possession rendered null and ineffectual, but his own right declared to be extinguished, or in law language, *resolved*, by his contravening the provisions of the settlement (*d*). Sir Thomas Hope, in reference to those memorable clauses, observes, "There is a new form found out which has these two branches, viz. 'either to make the party contractor of the debt to incur the loss and tinsel of his right in favour of the next in tailzie, or to declare all deeds done in prejudice of the tailzie by bond, contract, infeftment or comprising, to be null of the law.'" Of their combined effect he proceeds to give some account; and he declares his opinion to be, that except in questions with the Crown or the superior, they were valid declarations, effectual against the heirs as conditions of the grant, and against creditors-comprisers, because they cannot have the right, "*nisi cum sua conditione et causa.*" (*e*)

2. *Statute of* 1685 (*f*).—But notwithstanding the opinion of Hope thus strongly expressed, the effect of the irritant and resolutive clauses of the strict entail was long the subject of doubt and discussion, and it was only by a narrow majority of the Judges that it was ultimately supported (*g*). The power of the aristocracy prevented a renewal of the discussion, and procured a statute to be passed, which has proved in its practical operation one of the most stringent ever enacted. By this act it was made lawful to tailzie lands and estates, and burden substitute heirs with such conditions as the entailers should think fit, and to affect the tailzies with irritant and resolutive clauses, so as to restrain the heirs of tailzie from selling, alienating or disposing of the lands, or contracting debt, or doing any deed by which they might be apprised, adjudged or evicted from the substitutes in the tailzie, or the succession frustrated or interrupted. All such deeds

were declared null, and the next heir of tailzie might, upon contravention, take up the estate. The statute required that the irritant and resolutive clauses should be inserted in the procuratories of resignation, charters, precepts and instruments of sasine relating to the tailzied lands (a provision now dispensed with); and a register was appointed to be kept, wherein should be recorded the substantial parts of the deed of tailzie. It was farther declared, that the omission to repeat the provisions and irritant clauses in the rights and conveyances of the lands, should import a contravention against the person guilty of the omission, and his heirs, but should not affect creditors, or other singular successors contracting *in bona fide* with the person infefted in the lands.

3. *Relaxations.*—(1.) It was not until after the experience of a century, that the rigid strictness of the Scotch law of entail came, in the slightest degree, to be relaxed. Entails duly fenced in terms of the statute of 1685 were a bar to alienation and the contraction of debt, in all circumstances; and neither the interest of the public, nor that of individuals even in the closest degrees of relationship to the nominal proprietor, but actual life-renter, was allowed to overcome the stern provisions of the statute. (2.) At length, exchanges were permitted to a limited extent; the power of leasing enlarged by the Montgomery Act, (see *App.*); and, by the same statute, the heir in possession allowed, under certain intricate regulations, to charge against future heirs a proportion of the expense of improvements on the estate. These relaxations were soon followed by another, empowering heirs of entail to make limited provisions to their husbands, wives and children. But these modifications of the law were unaccompanied by a faculty to charge the fee of the estate with those expenses or provisions, and thus, by the gradual accumulation of the burdens imposed upon its successive possessors, it happened, in many instances, that the heir was compelled to resort to the merciful provision of

the Aberdeen Act, which excused him from yielding up to the creditors of his predecessors more than *two-thirds* of the rents, leaving him an apparent proprietor of an estate of which only one-third of the rental remained as a fund for supporting his artificial station. Other minor relaxations were from time to time effected, which will be noticed in the sequel. (3.) At length, however, the Parliament of 1848 has withdrawn the restraints on entailed proprietors, to such an extent as to give a new character to the law of entail in Scotland, and to assimilate the powers of heirs to those already possessed by the same class in England.

4. *Recent Change in the Law of Entail.*—The state to which the law has been brought by the Act of 1848,—which may well be allowed to bear the name of its learned promoter,—is understood, as respects future entails, to approximate as nearly, in substantive effect, to the English law of entail, as the difference in the forms of conveyancing in the two countries would admit of. That a great improvement has been thus effected is shown by the almost entire absence of opposition to the recent measure, which, although not a little indebted for its easy passage to the pressure of incumbrances, as well as the advance in liberal opinions which has recently taken place, owes much also to the structure of the Act, as adapted with great skill to the peculiar position of entailed estates, and the remedies which were imperatively demanded, not only by their overburdened and fettered proprietors, but the interests of the whole community.

5. *Distinctions between Existing and Future Entails.*—(1.) Very marked distinctions maintain between these two classes of tailzies, which will be noticed in order to be contrasted, as the work proceeds; and, in a concluding chapter, the structure of future entails will be more particularly adverted to. The terms, *existing entails*, will be used in reference to deeds of entail made before the statutory date of 1st August 1848, and *future entails*, to

those executed on or after that date. (2.) A leading feature in those distinctions is, the difference between the power of disentail in the two classes of tailzies. Among the facilities given for breaking down the present system, under which so much inconvenience has been felt, an important one consists, in the privilege vested in the proprietor in possession (*institute or heir*) (*h*) of disentailing with the consent of the *three* nearest existing substitutes —a number which is believed to be as much, if not more in accordance with the rights and interests of substitute heirs, on a fair average, than any other (*i*). It must thus in the course of years happen, that the *law of entail* will be the law made applicable by the Act to *future* entails, which, as will be shown in the proper place, differs much from that of *existing* entails.

(*a*) For a history of entails, see Sandford on Entails, cap. 1.

(*b*) Hope, Min. Pr. *v. Tailzies*, § 11, *et seq.* See Chapman *v.* Bryson, 22d Jan. 1760, M. 15,511, 5 B. S. 873 and 940.

(*c*) Balfour, *v. Interdiction*, c. 5.

(*d*) They are generally ascribed to Sir Thomas Hope, who is said to have advised the first strict entail, that of the lands of Calderwood. See 3 B. S. 168, 170.

(*e*) Hope's Min. Pr. *v.* Tailzies, § 18.

(*f*) 1685, c. 22. OUR SOVERAINE LORD with advice and consent of his Estates of Parliament STATUTES and DECLARES that it shall be lawful to his Majestie's subjects to tailzie their lands and estates and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit and to affect the saids tailzies with irritant and resolutive clauses whereby it shall not be lawful to the heirs of tailzie to sell annailzie or dispone the saids lands or any part thereof or contract debt or do any other deed whereby the samen may be apprised adjudged or evicted from the others substitute in the tailzie or the succession frustrat or interrupted Declaring all such deeds to be in themselves null and void and that the next heir of tailzie may immediately upon the contravention pursue declarators thereof and serve himself heir to him who died last infeft in the fee and did not contraveen, without necessity anyways to represent the contraveener, It is ALWAYS DECLARED that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters precepts and instruments of seasine, and the original tailzie once produced before the Lords of Session judicially who are hereby ordained to interpose their authority thereto and that a record be made in a particular Register-book to be kept

for that effect wherein shall be recorded the names of the maker of the tailzie and of the heirs of tailzie and the general designations of the lordships and baronies and the provisions and conditions contained in the tailzie with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said Register *ad perpetuam rei memoriam* And for which record there shall be paid to the Clerk of Register and his deputes the same dues as is payd for the registration of seasines and which provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie And being so insert his Majesty with advice and consent foresaid DECLARES the samen to be real and effectual not only against the contraveeners and their heirs but also against their creditors comprysers adjudgers and other singular successors whatsoever whether by legal or conventional titles. It is ALWAYS HEREBY DECLARED that if the saids provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same whereby the said estate shall *ipso facto* fall, accresce and be devolved to the next heir of tailzie but shall not militat against creditors and other singular successors who shall happen to have contracted *bona fide* with the persons who stood infeft in the said estate without the saids irritant and resolutive clauses in the body of his right. And it is further DECLARED that nothing in this act shall prejudge his Majesty as to confiscations or other fines as the punishment of crimes or his Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate but which fines and casualties shall import no contravention of the irritant clause.

(*g*) Stair, 2. 3. 58; Stormonth, 26th Feb. 1662, M. 13,994.

(*h*) 11 and 12 Vict. c. 36, § 52.

(*i*) I have seen the calculations by Mr W. T. Thomson, manager of the Standard Life Office, which are satisfactory on this point.

2. GENERAL STRUCTURE.—(1.) The strict entail is a settlement of lands on a particular series of heirs, made permanent by statutory clauses, and not existing independent of statute (*a*). In so much is it the creature of statute, that the ordinary feudal rules are suspended in their application to a tailzied fee, when their operation would bring subjects under the fetters of an entail by implication. Thus, resignation *ad remanentiam* in the hands of the proprietor of a tailzied superiority, does not consolidate the *dominium utile* with the *dominium directum*, to the effect of bringing the former under the restraining clauses of the

entail. The procuratory, under which the resignation is effected, must itself form, or be at least embodied in a substantive tailzie, and registered under the statute. Nor is it an exception to this rule that a renunciation or resignation *ad remanentiam* of a redeemable right operates in favour of the heirs of entail: rights in security are mere burdens on the fee, which may be extinguished by renunciation, or even by payment or intromission *(b)*. But as the statute prescribed no formula or style for a deed of entail, it is not to be assumed that even if a deed contained its precise words, it would necessarily be a good entail *(c)*. (2.) As respects the description of the lands and the feudal clauses, reference is made to the Feudal Conveyancing and its Supplement. (3.) The restraining clauses have generally received a strict interpretation, and ought to be framed with care, but there is no peculiar intricacy in their construction. To prepare a binding deed of entail is a task not of any real difficulty to the conveyancer who prefers the usual and acknowledged style to an untried phraseology of his own; and the observation so often repeated, that litigation in regard to deeds of conveyance is generally caused by a neglect of simple rules, is very applicable to the present subject. It was observed by a learned author that there were no *voces signatæ*,—no formal and indispensable words requisite to the efficacy of the irritant and resolutive clauses *(d)*; but it was the opinion of the majority of the Court, in a case decided in 1833, that certain technical words in general use, were essential in the clauses of limitation *(e)*. Yet it is nowhere stated with precision what those essential words are. (4.) By the statute of 1848, it is made unnecessary to introduce irritant and resolutive clauses into the deed of entail; and it is declared, that a clause authorising its registration in the Register of Tailzies, shall have in every respect, the same operation and effect as the most formal irritant and resolutive clauses duly applied to every prohihition, condition, restriction and limitation contained in

the tailzie, except only such as shall be specially excepted (*f*). (5.) Much variety of expression is employed in designating different branches of the entail. Thus the clauses which in statutory language are called *prohibitions*, are often styled *restrictions* and *limitations*, and although these words may be sufficiently descriptive of their nature, it is recommended, in framing deeds of entail, to employ the statutory term *prohibitions*. The terms, *restraints* or *restrictions*, and *restraining clauses*, seem to comprehend all those parts of the deed, (conditions, provisions, prohibitions, irritant and resolutive clauses,) whereby the powers of the members of tailzie, as fiars, are restrained or lessened, and *prohibitions, declarations, &c.* are comprehended under the statutory term *conditions* (*g*).

(*a*) Lord Meadowbank in Hamilton, 3d March 1815, F. C.

(*b*) Heron, 27th April 1735, Cr. and St. 1. 198; Galbraith, 14th Jan. 1814, F. C.; Wauchope, 14th Dec. 1815, F. C. See Fairlie, 11th July 1827, S.

(*c*) Lord Corehouse in Braimer, 18th Jan. 1839, 1. N. S. 383.

(*d*) Bell's Princ. 1732.

(*e*) See opinion of Lords Glenlee and other consulted Judges in Vere, 7th March 1833, F. C., and (5th March) 11 S. 520, affirmed, 14th July 1837, 2 S. and M'L., 817.

(*f*) 11 and 12 Vict. c. 36, § 39.

(*g*) Lawrie, 19th June 1744, 5 B. S. 738; Adam, 18th June 1840, 2 N. S. 1162, affirmed on Ap. 5th Sept. 1844, 3. Bell, 295; Dingwall, 26th Feb. 1842, 4 N. S. 816.

3. RULES OF CONSTRUCTION.—(1.) The rules for construing the restraining clauses in deeds of entail have unfortunately been far from uniform, either as respects the Court of Session or the House of Lords. The ancient rule was that of strict interpretation, as we learn from all our writers. Even Craig (*a*), an admirer of feudal greatness, observes, "*quod, licet maxima nobilitatis pars et sentiat et cupiat, nostro tamen jure talliæ odiosæ reputantur, et strictissimam interpretationem recipiunt,*" and yet in his time limitations in their modern rigour were unknown. In like manner, Stair regards tailzies as most unfavourable

and inconvenient (*b*); and Erskine describes them as imposing an unfavourable restraint upon property, and becoming frequently a snare to trading people, and therefore as *strictissimi juris* (*c*). The early decisions of the Court, it is true, were not uniformly in accordance with this notion; but the Court of last resort, in reversing the judgment in the Duntreath case, followed the opinion of our institutional writers, and discouraged the practice which had begun to prevail, of giving *fair play* to the entail by applying the rule of probable intention in opposition to that of strict interpretation (*d*). This tendency had scarcely been checked when the Court of Appeal, in their turn, deviated from the rule of strict interpretation, by giving a meaning to the word *dispone*, in a large class of cases respecting leases of unusual endurance, which it does not bear in Scotch law language, thereby drawing closer the fetters upon the heir in possession. The Court have, in these circumstances, unavoidably hesitated between the two rules of interpretation, sometimes dealing strictly with the restraining clauses, in other instances giving fair play to the deed; but at length the strict rule seems to have been finally adopted (*e*). (2.) The principle of strict interpretation means, not merely that without direct words limitations cannot be imposed on the members of tailzie from presumed or implied intention; but that, even where there are words within the deed having a certain tendency to indicate the intention of the entailer, they may, under the strict rule of construction, fail of effect either from want of technical or grammatical precision, or from error in the form and manner in which they are introduced. (3.) Strict construction maintains not merely in questions with third parties, creditors or disponees, but even *inter hæredes*— amongst the persons called to the succession, with relation to those clauses of the deed which impose restraints on the right of property (*f*). (4.) It remains to be seen how far the important relaxations introduced by the recent statute will affect the principle of construction, which may now

perhaps without injury receive a modification corresponding to that made in the power of restraint.

(*a*) Craig, 2. 16. 12.
(*b*) Stair, 2. 3. 58.
(*c*) Ersk. 3. 8. 29.
(*d*) Edmonstone, 24th Nov. 1769, M. 4409.
(*e*) See Speid, 21st Feb. 1837, F. C. 15 D. 618; and note of Lord Corehouse.
(*f*) Opinion of Lord Glenlee and other consulted Judges in Vere, 7th March 1833, F. C., and (5th March) 11 S. 520; affirmed, 14th July 1837, 2 S. and M'L. 817.

4. FORM OF THE DEED.—(1.) An entail may be in the form of a disposition, unilateral or mutual, or of a procuratory of resignation; or it may be embodied in a marriage-contract. The form of the disposition is probably the best, as warranting immediate infeftment without the necessity of entering with the superior, which that of the procuratory of resignation requires; and although it is inconsistent with the nature of fees that one should be his own vassal by original constitution, a rule which is illustrated by the practice in creating freehold votes under the old system, there is no feudal incompetency in a party granting warrant for his own infeftment by a holding *a se de superiore suo*, since a precept warranting a public infeftment is validated by the subsequent confirmation of the superior. Nevertheless, the deed of entail, when in the form of a disposition, in practice contains an alternative holding, even where the entailer conveys in his own favour as institute (*a*). (2.) But, in whatever shape it is executed, it was, until the late statute, essential to the deed as a strict entail, that proper prohibitive, irritant and resolutive clauses, should be directed against the disponee or institute, and the series of heirs expressed in the destination, as well as the particular acts which they are forbidden to commit; and the rule still applies to all the clauses except those called irritant and resolutive. But there was no fixed rule as to the place or form in which they should stand in the deed. It was even doubted whether the clauses must necessarily be contained

in the entail itself, although, in order to render the entail effectual against creditors and disponees, the statute of 1685 required that they should be inserted in the investitures following on it; and it was in more than one instance held that an entail might be validly constituted by declaring that the lands should be taken and held under all the conditions, and the prohibitory, irritant and resolutive clauses, expressed in an entail of other lands already completed by registration *(b)*. The view has since, however, been adopted that those instances involved a question merely *inter hæredes*, and that an entail was ineffectual against third parties without proper restraining clauses in the deed itself, and published by means of registration *(c)*. (3.) The statute makes mention of procuratories of resignation, charters, precepts and instruments of sasine. The first and third comprehend all the deeds by which a tailzie may be constituted. Thus, it is common to frame an entail in the simple form of a procuratory of resignation. To this case the statute directly applies; but when the procuratory or precept is contained in the body of a disposition of entail, it is not necessary to repeat the restraining clauses as contained in some other branch of the deed, in either clause. All the clauses of a deed are understood to be embodied in every other part of the same deed (*d*). Thus, it is not a valid objection to a deed of entail, that the limiting clauses are introduced before the destination, if it be clearly expressed that they shall apply to the whole series of heirs (*e*); and in a charter of resignation following on a procuratory contained in a deed of entail, it was held sufficient that the restraining clauses were engrossed in the *quæquidem*, as forming a burden on the resignation, although not even referred to in the dispositive clause. Such a reference, however, it was assumed, would have been essential in the deed of original constitution (*f*).

(*a*) Jurid. Styles, 1. 228, 240.

(*b*) Don, 14th July 1713, M. 15,591, Robertson's Ap. 76; Lawrie *v.* Spalding, 24th July 1764, M. 15,612. See opinion of Lord Glenlee and

other consulted Judges in Vere, 7th March 1833, F. C., (and 5th March) 11 S. 520, affirmed, 14th July 1837, 2 S. and M'L. 817; Broomfield, 29th June 1784, M. 15,618, H. of Lords, 19th May 1786.

(*c*) Lindsay, 2d March 1842, 4. N. S. 845, affirmed, 5th Sept. 1844, 3 Bell, 254; Paterson, 1st July 1845, 7. N. S. 950.

(*d*) Murray Kynnynmound, 5th July 1744, M. 15,380. Porterfield, 10th Dec. 1841, N. S., 4, 234. E. Buchan, 23d June 1842, 4, N. S. 1430.

(*e*) Innes, 23d June 1807, M. App. *v. Tailzie*, No. 13, affirmed.

(*f*) Vere, as above.

5. CLAUSES OF THE ENTAIL.—The form most convenient for reference is that of the unilateral disposition. It contains the following clauses, twelve in number, viz. The *narrative; dispositive*, and containing the *conditions, prohibitions and reservations; obligation to infeft; procuratory of resignation; assignation to the writs and rents; obligation to free the heirs of debts; reserved power to alter; dispensation with the delivery; procuratory for registration; clause of registration; precept of sasine and testing clause.*

6. NARRATIVE CLAUSE (*a*.)—(1.) The narrative or introductory clause contains the name and designation of the entailer. When feudally vested with the fee, he will be described as *heritable proprietor*. But it is not essential that his title should be feudalised: it is enough that he has the power of disposal, and thus a personal right to lands, either under a direct conveyance, or service as heir, by means of which the institute or substitutes may complete a title in virtue of an assignation either general or special to unexecuted precepts or procuratories, is sufficient (*b*). But it is essential to the application of the fetters, that the settlement be special, and not merely of lands belonging to or to be acquired by the entailer; for an obligation duly imposed upon the heir-at-law or trustees, is effectual only to found an action to enforce the execution of an entail, and does not constitute a substantive tailzie (*c*). Such an obligation is interpreted according to intention, and a direction to execute a strict entail implies that all the necessary clauses for producing that effect shall be

used, and, in particular, it has been held that the direction imports that the eldest of several heirs female shall be provided to succeed to the exclusion of heirs-portioners (*d*). (2.) It is frequently a question of importance if the title of a party desirous to execute an entail gives him the power of disposal, or of imposing additional restrictions on the right of property. Thus, one who has already by an onerous deed, settled his estate upon a particular heir or heirs, is tied up from adding to the destination or fettering the heirs, unless he has reserved a power to that effect. The same restraint lies on a proprietor under a conveyance which contains a prohibition against altering the course of succession, and consequently on a member of a strict entail other than the last substitute (*e*); (3.) An heir in apparency making an entail, but dying before his title is completed, transmits no valid obligation against his heir; but the heir will be bound by the entail at common law, if he should serve to the entailer; and if the entailer had been in possession for three years, the heir will incur obligation under the statute, if he should pass him by, and serve to a remoter ancestor (*f*). (4.) This clause recites also the cause of granting or consideration, which is the wish of the entailer to perpetuate his name and family. In a mutual entail the consideration is onerous, viz. the conveyance by each party to the series of heirs chosen by both.

(*a*) I A. heritable proprietor of the lands and others after described for the better preservation of my family and memory and for certain other weighty causes and considerations.

(*b*) Livingstone *v.* Napier, July 1762, 5 B. S. 888; Renton, 5th Dec. 1837, D. B. M. 16. 184, and 22d July 1842, 6 N. S. 230, affirmed, 18th Aug. 1843, 2 Bell, 214. Here the entail was made by the party in right of a procuratory of resignation in fee simple, unexecuted.

(*c*) Grant, 25th Jan. 1769, M. 15,422; Stirlings, 15th Dec. 1801, M. 15,455; King, 28th Feb. 1844, 6 N. S. 821, affirmed, 30th April 1846, 5 Bell, 82.

(*d*) Forrest's trustees, 14th Dec. 1845, 8 N. S. 304.

(*e*) Menzies, 5th June 1785, M. 15,436, Hailes, 169. Reay, 25th Nov. 1823, 2 S. 520, affirmed, W. S. 1, 306; Stewart *v.* Porterfield, 24th May 1829, W. S. Ap. 2, 269, and 13th Nov. 1829, F. C., and (18th Nov.) 8 S.

16, affirmed, 23d Sept. 1831, W. S. 5. 515; Meldrum, 29th June 1827, 5. S. 857; Duff, *Feud. Conv.* 299.

(*f*) 1695, c. 24, above, p. 206. See Carmichael, 15th Nov. 1810, F. C.

7. DISPOSITIVE CLAUSE (*a*)—This branch of the deed contains the destination framed according to the wish of the party, and the lands, under a reference to the conditions, provisions, reservations, and restraining clauses, as expressed in an after part of the deed. (1.) This clause is the ruling clause of the deed, and may be referred to for the purpose of explaining, or even limiting the executive or feudal clauses. Thus where the dispositive clause was in favour of the entailer's eldest son and the *heirs-male* of his body, but in the procuratory of resignation new infeftment was warranted to the eldest son and *the heirs of his body* generally, the terms of the dispositive clause received effect (*b*). (2.) Under *lands and estates*, in the sense of the statute, are included rights of property only, and not heritable debts, even those secured by adjudication, unless where the right of the adjudger has been feudalised, and the legal is expired, whereby it becomes a good prescriptive title, limited only by the right of redemption in the debtor (*c*). Burgage subjects may be validly entailed (*d*).

(*a*) I do hereby GIVE, GRANT and DISPONE to myself and the heirs-male of my body whom failing (*the substitution*) whom failing to any persons to be named by me in any deed of nomination or other writ to be made and executed by me at any time during my life; the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding always without division through the whole course of the female succession; and failing of such nomination or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees, ALL and WHOLE (*the lands*) with all my right and interest in the lands and others above disponed; BUT ALWAYS with and under the conditions provisions prohibitions declarations and reservations after written. (*Here follow the conditions, &c.*) *Note.*—The above clause is an example of an institution of the entailer himself, which is a frequent form of the entail, and is convenient in this respect that it saves all questions as to conditional institution and substitution.

(*b*) Forrester, 11th July 1826, F. C., 4 S. 824.

(*c*) Dalyell, 17th Jan. 1810, F. C.

(*d*) Maclauchlan, 27th Jan. 1768, M. 15,421; Dillon, 14th Jan. 1780, M. 15,432.

8. TERMS DESCRIPTIVE OF HEIRS.—(1.) The dispositive clause may contain a substitution of persons in succession after the disponee or institute, and it is of importance to mark the precise import of the terms descriptive of the different kinds of heirs. The word *heirs* has a general signification, and means those who take by law or destination, whether of *line*, *conquest* or *provision*, according to circumstances. (2.) *Heir of line* is the heir-at-law in an unlimited fee, or fee-simple as it is styled. It is nearly synonymous with *heir-at-law*, *heir-general*, *heir whomsoever or whatsoever*; but although the two characters may unite in one and the same individual, it can never import, in an abstract sense, heir-male or heir of conquest. (3.) *Heir of conquest* is the heir in *feuda nova*—fees acquired otherwise than by legal (opposed to provisional) succession, by one of three or more brothers, not the eldest. Such heir is the immediate elder brother, or his representative, and is contradistinguished from the heir in heritage, who is the immediate younger brother, or his representative, it being assumed that the deceasing brother leaves no heirs of his body. When the youngest of several brothers dies without issue, the immediate elder brother is heir both of line and of conquest. The same rule holds in the succession of a sister who dies leaving conquest, and survived by an elder and a younger brother (*a*). (4.) *Heirs-portioners* are females in the same degree of propinquity, *e. g.* daughters, sisters or nieces of the deceased, who succeed to equal shares *pro indiviso*. Conquest has no place among females: on the death of a female leaving no male heir, her sisters, or other nearest representatives, take equally (*b*). (5.) *Heir-male* is uniformly an heir of provision by the destination of an ancestor more or less remote, and means the nearest male heir connected by males, and exclusive of females and males connected by females. The term, *heirs-male*, although in the plural number, has a singular signification. An estate provided to the heirs-male

of a marriage, or of the body of a particular individual, descends to the eldest son; a rule which indeed applies universally to the term heirs, used in the plural number, except with reference to heirs-portioners, and heirs of conquest in marriage-settlements. It follows, that under a destination to *A., and the heirs-male of his body, and the heirs whatsoever of the body of the said heirs-male,* the heir whatsoever of the eldest son of A.'s body will take in preference to the second son of A. (*c*). An heir-male may be heir of conquest. For example, when a destination is conceived in favour of one and his heirs-male, it would seem that his immediate elder brother (failing issue of the body of the deceased) will take, as heir-male of conquest, in preference to the immediate younger brother as heir-male of line (*d*), unless the words, *heir-male of line,* are employed (*e*). *Heir-male of the body,* means precisely what the words in their ordinary sense import—the eldest son or his descendant being a male connected by males. (6.) *Heir-female* is the heir-at-law, whether a female, or a male connected by a female, failing heirs-male. Thus the grand-daughter by a son takes in preference to the grandson by a daughter. Thus also under a destination to *heirs-male* of the body, whom failing to *heirs-female* of the body, the succession on the failure of heirs-male belongs not to the heir-female of the last heir-male, but to the heir-female of the granter; and, therefore, in one instance, the grand-daughter of the entailer by his eldest son was preferred on the failure of the second son and his heirs-male to the grand-daughter of the second son; and in another the descendant of the grand-daughter of the eldest son was in like manner preferred to the descendant of the grand-daughter of a younger son (*f*). Questions of difficulty have arisen from the use of the word *daughter* in destinations, which is not synonymous in legal import with heir-female. Thus, under the terms, *eldest daughter or heir-female of a marriage,* the daughter of the heir-male of the marriage is preferred to his sister (*g*); the term,

eldest daughter, being here qualified and explained by that of heir-female. Apart, however, from qualifying expressions, the terms, *daughter, or eldest or only daughter,* mean the immediate daughter of the marriage, and are not synonymous with *heir-female being a female* (*h*). (7.) In the sense of the Act of 1848, the heir who is next in succession under the deed, to the heir in possession, and whose right of succession, if he survive, must take effect, is heir-apparent of entail (*i*). This definition is to be carefully kept in view, as introduced by the interpretation clause of the Act, for the purpose of so describing the heir having the indefeasible right of succession in the special circumstances to which it applies, because the term heir-apparent in the ordinary acceptation means an heir who is entitled to, but has not taken up the succession to property in which his ancestor died infeft. (8.) The terms, *heirs,* or *heirs and successors, or heirs and assignees whomsoever, or whatsoever,* mean the heir-at-law, in contradistinction to the heir by destination or provision: they are nearly synonymous with heir of line, and heir-general, but differ in this, that they embrace the heir of conquest (*k*). The flexibility of the terms is limited. When used in regard to the pertinents or accessories of lands, they have in some instances been interpreted by reference to other deeds (*l*); but in deeds of settlement of proper feudal subjects, the technical meaning will prevail, unless controlled by words occurring in the deed. Thus the terms, *heirs whomsoever,* will not be interpreted by reference to a prior destination to *heirs-male;* but the expression *heir-male,* which is exclusive, employed in another clause of the same deed so as to mark intention, will limit their import (*m*). Express words are necessary to restrict the application of the terms to *heirs of the body.* Thus a conveyance *to A., and his heirs and successors whomsoever, whom failing without a lawful child or children existing of his body, to B.,* imports a right in B. preferable to that of the heirs of A., not the issue of his own body, the meaning

of the terms, heirs and successors whomsoever, being controlled by the words which follow (*n*). And where the original deed of the progress contained a destination to heirs whomsoever *of the body*, the terms *heirs whomsoever* in a charter by progress received a similar restricted meaning. (*o*). (9.) *Eldest daughter or eldest son*, means the child who is such at the time when the succession opens (*p*).— See, on the subject of this section, the authorities in the note (*q*).

(*a*) 3 Stair, 4, 33; Grant, 29th Nov. 1757, M. 14,874; Robertson *v.* Halkerton, 7th July 1675, M. 5,605; Cunninghame, 7th Dec. 1770, M. 14,875. Here there is some obscurity, caused by the use of the words "eldest brother," in place of eldest brother alive. The eldest brother, there being an intermediate brother alive or represented by a son, could be neither heir of line nor conquest.

(*b*) Carse, 5th Feb. 1717, M. 14,873; Adams, Jan. 1727, M. 14,873.

(*c*) Lockhart, 19th Jan. 1737, F. C., 15 D. 376, remitted by H. of Lords for reconsideration, and adhered to by the Court, 24th Jan. 1840, 2 N. S. 377; See E. of Eglinton, 22d Jan. 1842, 4 N. S. 425.

(*d*) Dunbar, 24th June 1625, M. 5605.

(*e*) Sinclair, 24th June 1766, M. 14,944, affirmed on ap., 6th April 1767.

(*f*) Erskine, 3. 8. 46. Bell Pr. 1699, and auth. cit.; Hope, (Bargeny,) July 1738, Elch. *Prov. to Heirs*, 2, as reversed in H. of Lords, Cr. and St. 1. 237; Johnstone, 19th Nov. 1839, 2 N. S. 73.

(*g*) Lyon *v.* Blair, 19th June 1739, 5 B. S. 663.

(*h*) L. Essex Ker, 13th Nov. 1810, F. C. affirmed, 26th Feb. 1812.

(*i*) 11 and 12 Vict. c. 36, § 52.

(*k*) Brodies, 1749, 5 B. S. 466; D. Hamilton, 4th March 1771, M. 4,358, 4,369, 5 B. S. 467.

(*l*) Hay, 16th Nov. 1698, M. 14,899.

(*m*) Sandford on Success., 1. 192; M. Clydesdale, 26th Jan. 1726, M. 14,930, altered by D. Hamilton, 9th Dec. 1762, M. 4358; Maclauchlan, 12th Jan. 1757, M. 2312.

(*n*) Baillie, 17th June 1766, M. 14,941, Hailes, 64, 5 B. S., 928, as reversed, 26th March 1770; Sutties, 19th Jan. 1809, F. C.; Tinnoch, 26th Nov. 1817, F. C.

(*o*) Stirling, 28th May 1845, 7. N. S. 640.

(*p*) Ker, (Roxburghe,) 23d June 1807, M. App. *Tailzie*, No. 13, affirmed, 20th June 1810; Shepherd *v.* Grant, 1st Dec. 1836, F. C., 15 D. 173; affirmed, 28th May 1838, 3 S. and M'L., 255.

(*q*) Ersk. 3. 8. 47, *et seq.*; Bell's Princ. 1695, *et seq.*, and auth. cit.

9. DESTINATIONS. — 1. *Institute.* — The first person

called to the succession is styled the *disponee* or *institute*, and those postponed to him, *heirs* or *substitutes*. An institution may be *absolute* or *conditional*. The former is the common case of a direct conveyance to a particular individual, in existence or *nasciturus* as the case may be.

2. *Conditional Institution.*—(1.) This term is more commonly employed with respect to destinations of sums of money than of heritage. Its meaning in feudal conveyancing is by no means precise. By the civil law, substitutions in most cases resolved into conditional institutions, "and meant no more than if the institute either died before the granter, or declined to accept of the right, the substitute might take the succession: But when the institute took up the succession, the substitution evanished, and the succession, after the death of the institute, devolved not on the substitute, but on the heir of the institute" (*a*). In this sense conditional institution is not received in our law; the condition must be expressed, and this may be done in either of two forms, by a conveyance by *A. to B., failing heirs of A.'s body*, or equivalent terms (*b*); *or by A. to the heirs of his body, whom failing, to B.* Under these forms B. is styled a conditional institute. But there is a distinction to be observed between the effects of those two modes of destination. (2.) Under the first, B. is a proper disponee, (since to the heirs of A.'s body there is no conveyance,) subject to the condition that these heirs shall fail. Hence, on the survivance of an heir of the body of A., such heir will take, not under the conveyance, but as heir-at-law, and the disposition to B. will be evacuated. A conveyance, therefore, by A., *failing heirs of his own body, to B.*, has the precise effect of the Roman substitution. (3.) On the other hand, the latter form of conveyance above exemplified is a conditional institution only in as far as it vests the immediate right in B., in place of the heirs of A., conditionally on A.'s dying without issue. The condition being purified, B. is necessarily the disponee, or first

person in whom the right vests. But when A. is survived by an heir of his body, the right vests in such heir as institute, and B. acquires the character of a proper substitute; for his right of succession is not evacuated by an heir of the body of A. taking as disponee. There is thus a material distinction between the terms, *quibus deficientibus*, and *quibus non existentibus*. A conveyance, therefore, by *A. to the heirs of his body, whom failing, to B.*, although now styled a conditional institution, must be distinguished from the proper form of that destination (*c*). It may be called *uncertain* or *alternative*, as it depends on the existence of an heir of the body of A. whether it shall be an institution or a substitution of B.

3. *Substitutes.*—(1.) The heirs called to the succession after the institute are styled substitutes. To them the dispositive words provisionally apply; in other words, (except in conveyances by parents to children), the subject, on the death of the institute, whether prior or subsequent to that of the disponer, passes to the substitutes in their order, without respect of the proper heirs of the institute unless expressly called to the succession. For example, where an estate is conveyed *to A., whom failing, to B.*, without mention of A.'s heirs, the succession opens to B. on the decease of A. without having altered the destination, to the exclusion of A.'s heirs (*d*). (2.) The terms of the destination, therefore, form the law of the succession. Thus, under a destination *to A. and the heirs of his body, in fee, whom failing, to B.*, the latter is preferred to the heirs whomsoever of A. This is one of the simplest forms of substitution. Again, suppose a destination *to the heir-male of a marriage, and his heirs and assignees whatsoever; whom failing, to the heir-male of any subsequent marriage of the husband, and the heirs of his body; whom failing, to the heir female or eldest daughter of the first marriage, and the heirs of her body;* and the heir-male of the first marriage takes up the succession but dies without issue; in a question between the

heir-female of the first marriage and her younger sisters claiming as heirs-portioners of the heir-male, the latter, from the texture of the clause, will prevail (*e*). These instances are sufficient to shew the nature of a substitution. (3.) It is material to observe, that (when the destination has not been altered) the right of a substitute is absolute, and that it is the form of completing his title only which is contingent on the vesting of the right in the immediately prior substitute. Thus, under a conveyance to *A., and the heirs of his body, whom failing, to their heirs*, followed by other substitutions, if an heir of the body should exist, it is by no means necessary for transmitting a right to his heir whomsoever, that such heir of the body should have made up a title to the subjects, or even that a right should have been vested in him by service. The effect of the right not vesting is merely that the heir whomsoever must complete his title by service to A., in place of to the heir of A.'s body (*f*). (4.) It is now fixed that a branch of a destination may be introduced by the nomination and appointment of the granter, expressed in a separate writ, when power has been expressly reserved in the settlement. A substitution of heirs *nominandi* appears, indeed, to have been usual at an early period, as we learn from Dallas, who embodies the necessary form in the ordinary styles of the entail. Heirs to be named are not more uncertain than heirs *nascituri*, to be born, and it has never been doubted that these may provisionally be called to the succession (*g*). (5.) A substitution is usually marked by the words *whom failing*, but these, although perhaps decisive, are not essential. Thus, a conveyance to A. and his heirs implies a substitution to the heirs, who are not joint fiars with A., but have a bare right of expectancy and must take by service. Thus, also, under a clause *to myself, and to B., my only lawful son, and the heirs-male of his body*, &c. or *to myself and B., and longest liver of us two, in liferent and conjunct fee for B.'s liferent use thereof allenarly, and to C. and the heirs-male of his body*,

whom failing, &c. B. in the one case, and C. in the other, is a mere substitute (*h*).

(*a*) Ersk. 3. 8. 44.

(*b*) Stevenson, 24th June 1784, M. 14,862; Leitch's Trustees, 2d June 1826, F. C.

(*c*) Dickson, 23d Feb. 1697, M. 14,851; Forbes, 3d Aug. 1756, M. 14,859; Colquhoun, 8th July 1831, F. C., 9 S. 911; Murray, 21st May 1838, F. C., 11 S. 629; Fogo, 25th Feb. 1840, 2 N. S. 651, and on remit 11th March 1842, 4 N. S. 1063, and in H. of Lords, 18th Aug. 1843, 2 Bell, 195.

(*d*) Ersk. as above; Bell Princ. 1704.

(*e*) Richardson, 5th July 1821, F. C.; Lockhart, 19th Jan. 1837, F. C., 15 D. B. M. 376.

(*f*) Murray, 22d June 1744, M. 14,952.

(*g*) Porterfield, 15th May 1821, F. C., and House of Lords, 2 W. S. 369, also 18th Nov. 1829, F. C., 8 S. 16, affirmed, 5 W. S., 515. The clause of destination is in these terms: "Binds and obliges him and his heirs and successors with all possible diligence upon his own charges and expenses duly and validly to infeft and seise the said William Porterfield his said son and the said Julian Steel spouses and the longest liver of them two in conjunct fee and liferent, and the heirs-male procreate or to be procreate of the said marriage betwixt the said William Porterfield and Julian Steel; whilks failing the heirs-male of the body of the said William Porterfield of any other marriage, whilks failing the heirs-male of the body of the said Alexander Porterfield, whilks failing the eldest heir-female of the body of the said William Porterfield and the descendants of the body of the said eldest heir-female without division, whilks failing the next heir female *successive* of the body of the said William Porterfield and the descendants of the body of the said next heir-female *successive* all without division, *whilks failing any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield by write under his hand at any time in his lifetime in his liege poustie, whilks failing the eldest heir-female*," &c. &c.

(*h*) Strathmore, 1st Feb. 1837., F. C., 15 D. 449; Wardlaw Ramsay, 23d Nov. 1838, 1 N. S. 83; Stair, 3. 5. 51; Livingstone, 3d March 1762, M. 15,409, 15,418, affirmed on ap.; Gordon, 23d Feb. 1791, M. 15,465.

10. CONSTRUCTION OF DESTINATIONS.—1. *General rule.*—It is a general rule in construing technical terms in destinations, to take the meaning which the law has bestowed upon the words, without reference to the context or extraneous matter (*a*). (1.) Thus, under a conveyance to *a son and his heirs-male and assignees whatsoever, whom failing, to the father's other nearest heirs;* the heir-male

(although not of the body) of the son predeceasing the granter is preferred to the granter's daughters, without regard to probable intention (*b*). (2.) Again, in a destination to *A. and B. nominatim et seriatim, and the heirs-male of their bodies; whom failing, to C. and his lawful heirs-male; whom failing, to the heirs-female of D.;* the term lawful heirs-male being unambiguous, and not limited to issue-male or heirs-male of the body, the heir-male general of C. is preferable to D.'s heir-female (*c*). (3.) Thus, also, where an estate was disponed by A. *to the eldest son living at the time of his decease, procreated between his eldest daughter B. and her husband, and the heirs-male of his body, in fee; whom failing, to the eldest son of C. and of D. (the second and third daughters of A.) seriatim, and his heirs-male; whom failing, to the second son of each of the three daughters seriatim, and his heirs-male; whom failing, to the heirs-male of the three daughters in the same order of succession;* in a competition between the fourth son of B. and the eldest son of the third son of C., upon the failure of prior heirs, the former was preferred as undoubted heir-male of B. (*d*).

2. *Exceptions.*—Exceptions are admitted to the general rules of construction. (1.) Express declaration or necessary implication will control the meaning of technical terms. For example, a destination to the *eldest daughter of a marriage without division, and their heirs-male, whom all failing, and their said heirs-male, to the granter's nearest and lawful heirs whomsoever,* imports the substitution of the heirs-male of all the daughters in their order; and the *heirs-male of a daughter, she always marrying a person of lawful descent,* import the heirs-male of her body (*e*). Again, where lands were destined to *A. and the heirs of his body; whom failing, before the granter, then to B., the immediate younger brother of A., and the heirs of his body; whom all failing, then to the granter's own nearest heirs and assignees whomsoever,* and B. was in the other clauses of the deed referred to as a substitute, and not a mere con-

ditional institute, he was preferred on the decease of A., who had survived the granter, to the heirs whatsoever of the granter and the heir of conquest of A. The latter claimed on the ground that the destination was at an end by the survivance of A., and the former maintained that the succession upon A.'s death (who did not fail in terms of the condition,) opened to the heirs whomsoever of the granter (*f*). (2.) But the Court will not disregard the technical meaning of terms used in the dispositive clause, although words of a broader import may occur in another part of the deed. Thus, where the dispositive clause contained the term *heir-male of the body*, and the procuratory of resignation, that of *heirs of the body* generally, the former were held to be the ruling words (*g*). The dispositive clause, as the leading branch of the deed, is taken to be engrossed in the procuratory of resignation and precept of sasine, which, as mere executive clauses, cannot control, although their terms may, in favourable and peculiar circumstances, be admitted to explain, the clause of conveyance. Thus, the omission of the heirs of one of the substitutes in the dispositive clause of a deed of entail was allowed to be supplied from the procuratory of resignation, the blunder being considered palpable; but the decision ought not to be relied on in practice (*h*).

(*a*) Bell's Princ. 1694, and auth. cit.
(*b*) Campbell, 28th Nov. 1770, M. 14,949.
(*c*) Hay, 24th July 1788, M. 2815, affirmed on ap., 7th April 1789.
(*d*) Shepherd, 1st Dec. 1836, F. C. 15 D. B. M. 178, affirmed, 28th May 1838, 3 S. and M'L. 255.
(*e*) Ker, *(Roxburghe,)* 23d June 1807, M. App. *v. Tailzie*, No. 13, affirmed on ap.
(*f*) Govan Smith, 14th Dec. 1830, F. C., 9 S. 180.
(*g*) Forester, 11th July 1826, F. C., S. 4. 831.
(*h*) Sutherland, 26th Feb. 1801, M. App. *v. Tailzie*, No. 8; Shanks, 27th Jan. 1797, M. 4295.

11. PRACTICAL RULES AS TO DESTINATIONS.—The cases noticed in § 10, point out the inconvenience of inaccurate expressions in destinations. As the meaning of the tech-

nical terms is well defined, the conveyancer can have little difficulty in framing clauses of whatever length. (1.) It is a practical rule not to be lightly disregarded, to employ the words, *whom failing*, to denote a substitution, as these necessarily exclude all doubt as to the character of the members of the destination. (2.) A destination in the simplest form may be thus expressed: *To and in favour of A. and the heirs (or heirs-male) of his body; whom failing, to B. and the heirs (or heirs-male) of his body*, and so on; *whom all failing to the heirs and assignees whomsoever of the granter.* (3.) The introduction of heirs-female will be accomplished by this form of words: *To and in favour of A. and the heirs-male of his body; whom failing, to the heirs-female of his body, the eldest heir-female always succeeding without division, and excluding heirs-portioners; whom failing, &c.*; but under a destination thus expressed, it will be observed, that the daughter of a son will exclude the immediate daughter of the marriage, which is besides consistent with the ordinary rules of succession. When it is intended, therefore, for particular reasons, to favour the latter, the clause will be in the following terms: *To and in favour of A. and the heirs-male of his body; whom failing, to the eldest daughter procreated or to be procreated of his body, and her heirs-male; whom failing, to the heirs-female, &c.* (4.) When it is the intention to give an estate to one and his own family only, and failing them to another, care must be taken to employ the words, *heirs of his body.* Thus, where lands were disponed *to A., his heirs and assignees, whom failing, to B., and his heirs and assignees, the* sister-german of A., on the failure of his children, was preferred to B. (*a*). Thus, also, under a destination by *A. to his son B., and his heirs-male, whom failing, to the heirs-female of the body of A.*, the heir-male general of B. after or failing his own sons, will be preferred to the daughter of the granter. Other examples of the danger of the incorrect use of technical terms can be easily figured.

(*a*) Baillie, 17th June 1766, M. 14,941, Hailes, 64, 5 B. S. 928, as reversed, 26th March 1770.

12. DESTINATION, SIMPLE OR WITH PROHIBITIONS.—The destination in the strict entail is fenced with prohibitory clauses, which distinguish it from the simple destination in an ordinary settlement. (1.) A simple destination is defeasible by the institute or the substitute heir in possession, who has the power gratuitously to alter the law of the succession. Such alteration must, however, be express. Thus a party, who is both heir of line and heir of provision under a simple destination, although he may validly complete a title in either character, does not, by service and infeftment as heir of line, vacate the destination. The *spes successionis* of the heirs of provision can only be defeated by a direct conveyance to another, or by the fiar's resignation in favour of himself completed by charter from the superior, since, until altered by one having the power of disposal, the appointment of the former proprietor controls the ordinary law of succession (*a*). A clause of redemption in a settlement is subject to the same rule (*b*). (2.) But a *clause of return*, whereby the granter closes a destination with himself or his heirs, is interpreted according to circumstances. *First*, If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return being thus gratuitous may be gratuitously defeated; *secondly*, If the conveyance be gratuitous, a clause of return is regarded as a condition of the grant; and as the grant must be taken and held subject to the condition, it cannot be gratuitously taken out of the provisional line of succession; *thirdly*, If the clause be conceived in favour of a third party, it resolves substantially into a substitution, and is consequently defeasible by the institute or prior substitutes at pleasure; *fourthly*, Where the return in a gratuitous conveyance, being to the granter himself, does not immediately follow the grant to the institute and his heirs, but is preceded by interposed substitutions, it seems to be defeasible by the institute, or any substitute

but the last, since a *jus crediti*, effectual for opposing an alteration of the destination, does not belong to the substitutes, and cannot arise to the granter, so long as there are interposed parties, who have a prior right of succession (*c*). (3.) If it is the wish of the maker of a settlement to restrain the institute and substitutes from defeating the destination, unless for onerous considerations, the deed must contain a *prohibitory clause*, which is introduced as a limitation and restriction of the right, and confers a title on the future heirs to object not only to an alteration of, but even to an addition to the destination, and bars the heir in possession from imposing limitations and restrictions upon his successors. They have a right to the estate *tantum et tale* as it was left by the ancestor, so long as it remains unaffected by the debts or onerous deeds of their predecessors (*d*). (4.) But a mere prohibition against alienation, or altering the order of succession, not fortified by irritant and resolutive clauses, does not restrain the institute or substitutes from selling the estate, or burdening it with debt, or with provisions to husbands or wives, or children (*e*); nor does it warrant inhibition, or save the estate from the diligence of creditors (*f*), or import an obligation on the heir or person who contravenes to reinvest the price, subject to the provisions of the settlement (*g*). But an obligation of this nature may, in express terms, be laid on the institute or substitutes (*h*).

(*a*) Stair, 2. 3. 43; Edgar, 31st May 1742, Cr. and St. 1. 334, M. 3089-90, Elch. *v. Serv. and Conf.* 6; Snodgrass, 16th Dec. 1806, M. App. *v. Serv. of Heirs*, No. 1; Harvie, 12th Dec. 1811, F. C. Molle, 13th Dec. 1811, F. C.

(*b*) Græme's Trustees, 1791, M. 4329; Clayton, 1791, M. 2345.

(*c*) Ersk. 3. 8. 45; Bell Princ. 1705, and cases cited. Mackay, 13th Jan. 1835, 13 S. 246, and opinion of Lord Medwyn.

(*d*) Menzies, 25th June 1785, M. 15,436; Meldrum, 29th June 1827, F. C., 5 S. 857; E. of Fife, 7th March 1828, F. C., 6 S. 698; E. of Eglinton, 22d Jan. 1842, 4 N. S. 425, 445.

(*e*) Lockhart, 27th Jan. 1761, M. 12,345; Cunningham, 5th Aug. 1778, M. 15,526.

(*f*) Ersk. 3. 8. 23; Bell Princ. 1718, and cases cited; Chapman *v.* Bryson, 16th Nov. 1759, 27th Jan. 1760, M. 15,511, 5 B. S. 873, 940; Mitchelson, 15th June 1831, 9 S. 741.

(*g*) Bell Princ. 1719, and cases cited.

(*h*) PROVIDED ALWAYS as it is hereby expressly PROVIDED and DECLARED that in case my said disponee or any of my said heirs of provision before written shall in order to disappoint the full meaning and intent of these presents sell the said lands or any part thereof or otherwise dispose of the same for onerous causes, they shall be obliged to employ the price or value thereof towards the purchase of other lands or on sufficient security and to take the rights thereof under the same substitutions conditions and limitations as are herein contained.

13. CONDITIONS OF THE TAILZIE.—Here commences the statutory branch of the deed. The statute permits proprietors to tailzie their lands under such conditions as they shall think fit. Conditions imply certain acts which the persons favoured by the entailer are required to perform, in contradistinction to those which they are forbidden to commit by a future clause containing prohibitions; and they are interpreted according to the fair meaning of the terms (*a*). The most frequent conditions in the modern entail which, according to the new forms are properly introduced into the dispositive clause, will be noticed in their order.

(*a*) More's Notes on Stair, clxxxiv.

14. CONDITION TO BEAR NAME AND ARMS (*a*).—A condition to bear the family name and arms seems to be binding independent of statute (*b*). Where a distinctive coat of arms has not been already assigned by lawful authority to that particular branch of the family which comprehends the entailer, this condition imports an obligation on the institute, or heir in possession, to follow out the wishes of the entailer, by obtaining from the Lyon arms of the same general character with those expressed in the condition, descendible to the heirs of entail (*c*). The neglect of this condition is hurtful only to the contravener.

(*a*) With and under this condition always as it is hereby expressly provided that my said whole heirs of entail above written shall be bound and

obliged constantly to bear use and retain the surname of A. and arms and designation of A. of C. in all time after their succession to or obtaining possession of my said lands and estate as their proper surname arms and designation. *(The word* only *will be used if it is intended to prevent the heirs from bearing any other name and arms.)*

Note.—It will be observed, that the above clause relates to an institution of the entailer himself. Where another is disponee or institute the condition will be directed against *the said B. and the heirs of entail above written.* The same observation applies to the clauses quoted in some of the future notes.

(*b*) Stevenson, 26th June 1677, M. 15,475.

(*c*) Moir, 5th Feb. 1794, M. 15,537.

15. CONDITIONS TO RECORD AND COMPLETE A TITLE, (*a*).—1. *Registration essential.* (1.) The recording of the entail in the register of entails, and completing a title under it by infeftment, are steps essential to the right in questions with third parties, the former as being a statutory, and the latter a feudal requisite; but they are not so *inter hæredes*, amongst the members of the tailzie, who are bound by the quality of their own title (*b*). (2.) These conditions embrace the most essential requisites of the tailzie, and ought to be especially in the view of the conveyancer both in the preparation of the deed, and the completion of the right. The necessity of registering the deed on the one hand, and feudalising the right on the other, illustrates, in the clearest manner, the operation of the influences which it is the object of these forms to combine, and thus make subservient to the purposes of the entailer. Until registration the statutory conditions are disregarded, and without infeftment the feudal rules are not fulfilled. A combination of the statutory and feudal forms is thus required to make the strict entail a perfect right. (3.) It does not appear to have been formally decided, that a deed of nomination of heirs executed in virtue of a power reserved by the entailer, must, in order to receive effect, be recorded in the register of tailzies; but it is probable that the terms of the statute would be held to apply to it. The point, it is understood, was indeed so ruled by the Lord Ordinary in the Porter-

field case. There seems a marked distinction between such a deed, and the judicial or *quasi* judicial forms by which an heir *nasciturus* takes up the succession after coming into existence. Such heir is described in the destination by technical language, and his place in the tailzie clearly marked out; but a substitute *nominandus* has no legal existence unless under the deed of nomination (*c*). (4.) Registration in the books of Council and Session is useful for preservation only.—The following cases will shew the propriety of the substitute heirs exercising their right to enforce these conditions.

2. *Entail registered but not feudalised*—(1.) When the member in possession is heir of the last investiture, he may, disregarding the personal right, bring the estate to judicial sale for payment of the entailer's debts (*d*), or the creditors of the heir may attach it by special charge and adjudication (*e*); and as special charge is equivalent to special service, such heir may himself complete a title clear of the limitations of the entail, and grant a valid conveyance to a purchaser (*f*). But although the heir of the former investiture, neglecting to complete a title, should have possessed on apparency for three years, his debts, (with the exception of those with which the entail gives power to charge the estate, *e. g.* provisions to husbands, widows and children (*g*),) will not affect the estate unless made real by adjudication during his lifetime, and the next heir may complete a title under the entail without incurring liability under the statute of 1695 (*h*); for, as creditors would have unquestionably been excluded by a title made up under the entail, they cannot acquire a better position as regards the next heir, by the member in possession disregarding the entail (*i*). (2.) When, on the other hand, the institute, or member succeeding, is not heir of the last investiture, but a stranger, the rule is different. His right being solely grounded on the entail, he cannot sell the estate, nor may his creditors attach it, unless under all the qualifications of the right; their dili-

gence will thus affect no more than the liferent of the member in possession; a rule which has been established on the general principle which regulates the transmission of personal rights (*k*). (3.) It follows, from the doctrine established by the cases last referred to, that so long as his title continues personal, the member in possession, although heir of the last investiture, cannot, by voluntary deed, alienate or burden the estate (*l*).

3. *Entail feudalised but not recorded.*—(1.) If the entail has been merely feudalised and not also recorded in the register of entails, the conditions of the statute have been disregarded. The member in possession may sell the lands (*m*), or they may be adjudged by creditors (*n*). And it is no bar to the diligence of creditors that the entail is recorded, provided the debts upon which it proceeds were contracted before the registration (*o*), even although decree of irritancy on the ground of contravention has preceded the diligence (*p*). Nor does it appear that future heirs can maintain an action for damages against a member contravening the provisions of an unregistered entail, since the substitutes having themselves the power to enforce the condition, it cannot be neglected without their participation (*q*). (2.) But where the entail is a mutual and onerous deed, it becomes effectual when feudalised, although remaining unrecorded, to exclude creditors whose debts have not been made real before infeftment, if contracted after the date of the entail (*r*). (3.) Effect was, however, refused to a provision to a wife beyond the permission in an unregistered entail (*s*).

(*a*) AS ALSO with and under this condition that the heirs of entail succeeding to me shall be BOUND and OBLIGED to record these presents in the register of tailzies as also in the books of Council and Session for preservation and also to complete their titles upon these presents by infeftment duly registered in case the same shall not have been done by myself and that within year and day after my decease in case the person so succeeding shall be within the united kingdom at the time and in case he shall be furth thereof then within year and day of his coming thereto without prejudice nevertheless to any of the heirs of entail to apply for recording these presents sooner if they shall think proper.

(*b*) Ersk. 3. 8. 26-7; Sandford on Entails, 179, *et seq.*; Willison, 26th Feb. 1724, M. 15,369; Hall, Feb. 1726, M. 15,373; Macgill, 13th June 1798, M. 15,451; Carmichael, 15th Nov. 1810, F. C; Livingstone, 25th May 1839, 1. N. S. 815.

(*c*) See opinion of the majority in Stewart *v.* Porterfield, 13th Nov. 1829, F. C., and (13th Nov.) 8 S. 16.

(*d*) Mitchell, 4th Feb. 1809, F. C.

(*e*) Douglas, 22d Feb. 1765, M. 15,616, B. S. 5. 907; Russell, 31st Jan. 1791, M. 10,300, Bell, 166; Cathcart, 1st July 1846, 8. N. S. 970.

(*f*) Kennedy, 11th Feb. 1829, 7 S. 397.

(*g*) Glencairn, 23d May 1800, M. App. *Heir Apparent*, No. 1.

(*h*) 1695, c. 24.

(*i*) Dickson, 24th Feb. 1801, M. App. *v. Tailzie*, No. 7.

(*k*) Denholm, 5th June 1733, Cr. and St. 1. 113; Creditors of Gordon, 14th Nov. 1749, M. 15,384; Boyd, 22d Jan. 1766, B. S. 5. 919; Chisholm, 27th Feb. 1800, M. App. *v. Tailzie*, No. 6; Syme, 1st Feb. 1803, M. 15,619.

(*l*) Chisholm, as above.

(*m*) Graham, 11th Dec. 1829, 8 S. 231.

(*n*) Willison, 8th Dec. 1724, M. 15,371.

(*o*) Smollett's Creditors, 14th May 1807, M. App. *v. Tailzie*, No. 12; Rose, 11th June 1828, F. C., 6 S. 945; affirmed, 30th August 1831, 5 W. S; Ferrier, 10th Dec. 1813, F. C.

(*p*) Opinion of the Court in Munro Ross, 9th Feb. 1836, F. C., 14 D. 453.

(*q*) Queensberry Executors, 7th March 1828, 6 S. 706, reversed, 16th July 1830, W. S. 4. 254. See opinions of Lords Justice-Clerk, Alloway and Newton.

(*r*) Agnew, 31st July 1822, Shaw's App. 1. 320.

(*s*) Noble, 12th July 1758, M. 15,606; Duch. D. of Roxburghe, 11th Jan 1820, F. C. See More's Stair, clxxxii.

16. CONDITION TO POSSESS UNDER THE ENTAIL (*a*).—(1.) The member in possession is required to possess under the entail, and in virtue of no other title, except as strengthening or supporting the entail. To complete a feudal title in fee-simple, therefore, the entail remaining personal, will infer a contravention of the condition. Substitute-heirs have a title to enforce the condition without a special clause to that effect (*b*). (2.) This condition applies solely to the title in the person of the heir in possession under which he holds the estate, so as to prevent his resting on a fee-simple title, to the prejudice of the entail, and does not operate as a prohibition against altering the succession (*c*).

(*a*) AND ALSO with and under this condition that the said *(the institute)* and the whole heirs of tailzie above written shall take and possess the lands and estate above disponed upon this tailzie only and upon no other right or title whatsoever And that they shall use any other title which they may happen to have or acquire as an additional and collateral title thereto for strengthening and supporting this deed of tailzie only and for no other purpose whatever.

(*b*) Maule, 1st March 1782, M. 10,963; Hailes, 899.

(*c*) Trotter's Trs., 10th March 1840, 2. N. S. 826.

17. CONDITION TO INSERT THE CLAUSES IN THE TITLE-DEEDS (*a*).—This is a statutory provision, and consequently, obligatory on the heirs without being expressed. It applies as well to deeds made before as since the passing of the Act of 1685. In order to affect creditors and other singular successors, the clauses must until recently have been inserted, and not merely referred to, in the title-deeds following on the tailzie. But by the Transference of Lands Act it is made sufficient to refer to the conditions and other statutory clauses (*b*). (See below, *Completing titles*). It is proper to add to those deeds enumerated in the statute decrees of special service.

(*a*) AS ALSO with and under this condition that the said (*the institute*) and the whole heirs of tailzie foresaid shall be obliged to cause ingross and *verbatim* insert the whole foresaid destination and order of succession (at least in as far as shall be subsequent to the heir in possession for the time) in the charters and sasines to follow hereupon and in all future charters precepts of sasine procuratories of resignation, decrees of special service and instruments of sasine of the lands and others above disponed, or any part thereof and likewise to cause insert in the same and in all other deeds instruments and writings relating to the said lands and estate or any part thereof the conditions prohibitions provisions and reservations herein expressed or a special reference thereto in the manner directed by the *Transference of Lands* Act (10th and 11th of Victoria, caput 48.)

(*b*) Garnock, 28th July 1725, M. 15,596; 10 and 11 Vict. c. 48, § 4.

18. CONDITION OF DEVOLUTION (*a*).—(1.) It is not unusual to provide that a member of the tailzie shall forfeit his right on succeeding to another estate, or to a peerage, and that the lands shall thereupon devolve to the next heir. A condition of this nature is interpreted unfavourably to the heir in possession. Thus the devolution was held to take effect by his succeeding to the entailed estate,

after he had acquired the forbidden succession (*b*). The same rule was followed in the case of a peerage (*c*). In neither of the instances in the notes was there room for the question, whether the member of tailzie taking first the forbidden succession should have the option which of the two estates he would retain. In a later case, the Court were unanimously of opinion, that as the clause of devolution was, in the circumstances, available to the next heir only under an equitable interpretation of its terms, the member succeeding in the first place, to the forbidden estate, was on his part entitled to the equity of renouncing that estate, and taking under the entail (*d*). To exclude this equitable construction, a special provision may be introduced to the effect, that the member of tailzie taking up the forbidden succession, whether before or after succeeding under the entail, shall thereby forfeit all right to the entailed estate. (2.) A clause of devolution to take effect on the birth of a child, and unprotected by a duly fenced prohibition against sales, has no greater force than a substitution; so that, in the meantime, the proprietor in possession may sell the estate without being accountable for the price (*e*).

(*a*) See clauses below.

(*b*) Lockhart, 25th Nov. 1755, M. 15,404. The condition was in these terms: "It is hereby expressly provided and declared that whensoever the said Charles Gilmour or the heirs above mentioned succeeding to and possessing my estate shall also succeed to the estate now belonging to the said Sir Alexander Gilmour then and from thenceforth the right of my estate in their favour shall cease and be extinct void and null and the same shall fall and pertain to the next heirs of tailzie appointed to succeed to whom it shall be lawful to procure themselves served retoured infeft and seised in my estate as heirs of tailzie to the person who was last infeft before the person thus succeeding to Sir Alexander Gilmour's estate or to obtain adjudication declarator or any other method of the law as aforesaid." Bruce Henderson, 20th Jan. 1790, M. 4215. The clause was in these words: "In case any of the heirs of tailzie shall happen to succeed to and be in possession of the estate of Fordel then the said heir shall be obliged to make up titles to the lands of Earlshall and convey the same to his second son &c. whereby the two estates may be enjoyed by two separate and distinct persons and the said lands of Earlshall not be absorbed in the estate of Fordel.

(c) Fleming, 19th Jan. 1804, M. 15,559. The clause was in these terms: "And further providing in case it shall happen any of the heirs of tailzie above mentioned others than the heirs-male of my body or of the body of the said Mr Charles Fleming to succeed to the title and dignity of peerage then and in that case and how soon the person so succeeding or having right to succeed to my said estate shall also succeed or have right to succeed to the said title or dignity of peerage they shall be bound and obliged to denude themselves of all right title or interest which may be competent to them of my said estate and the same shall from thenceforth *ipso facto* accrue and devolve upon my next heir of tailzie for the time being sicklike as if the person so succeeding were naturally dead."

(d) Stirling, 16th Jan. 1834, F. C. 12 S. 296.

(e) E. of Eglington, 3d June 1847, 9 N. S. 1167, affirmed, 25th Feb. 1847, 6 Bell, 136.

19. AGAINST WHOM ARE THE CONDITIONS, &C. EFFECTUAL?—1. *Heirs and substitutes how interpreted.*—The statute in words imposes the conditions, provisions and restraints or fetters, upon the *heirs and substitutes* of tailzie only. This mode of expression may have arisen from the loose construction bestowed upon these terms at that early period, when the distinctive meaning now attached to the word *institute* had not come prominently into view. Or it may have been a result of the general practice of conveyancers to make the entailer the disponee, whereby his successors were necessarily heirs and substitutes of tailzie (*a*). But it has never been seriously disputed that the disponee or institute, or first person called as fiar, may be effectually restrained.

2. *The entailer.*—A party cannot tie up his estate from the diligence of his creditors by imposing gratuitous fetters upon himself (*b*), although he may do so for onerous causes, *e. g.* in a marriage-contract, or by means of a mutual or onerous entail (*c*). The maker of the entail is thus in the ordinary case an unlimited fiar, even when, by the tenor of the deed, he is a party restrained.

3. *The institute.*—(1.) The disponee or institute in a tailzie is the person, whether named or unborn, to whom the fee is in the first instance directly given; and as he is thus the party primarily favoured, on whose failure only is the estate to descend to the substitutes, his due

nomination is essential. Consequently a tailzie in which there is a fatal erazure in the name of the institute is invalid (*d*). The simplest example of an institution and substitution consists in a conveyance to A., whom failing, to B. But in general the question, who is institute, is resolved by ascertaining to whom the character of first fiar or disponee belongs. Thus, in a destination by a father *to himself, and to A. his only lawful son, and the heirs-male of his body*, the father continues fiar, and is consequently the institute in the tailzie (*e*). (2.) It follows that a bare liferent, whether reserved to the entailer or granted in favour of another, cannot alter the character of the first disponee (*f*). (3.) As entails are generally executed in favour of a *nominatim* institute, questions can seldom arise in regard to the character of an heir unborn, unless under destinations in marriage settlements. But it is thought that a conveyance to a parent in liferent, (not limited by the taxative word *allenarly*,) and to the heir of the marriage in fee, whereby the father is undoubted fiar, would confer the character of a substitute and not of institute on such heir. (4.) Where again the terms were such as to constitute a fiduciary fee in the parent, it was held unanimously, that under a destination to *A. in liferent, for her liferent use only, and to the second son to be procreated of her body, and the heirs-male of his body, whom failing, &c.* the fee vested in the second son on his coming into existence, as institute, and that his character as such was not affected by his completing a title by service. That step, although employed to declare his title, was not essential to transmit the right (*g*). (5.) Where a proper conditional institution has been made, the person taking the fee on the condition being purified is necessarily the institute (*h*). (6.) But where a conveyance is made by *A. to the heirs of his body, whom failing, to B.*, or by another to *A. and his heirs whomsoever, whom failing, to B. &c.*, other forms of conditional institution, it has not been expressly decided whether on the death of

the granter without heirs of his body, in the one case, and in the other, without being survived by A. and his heirs whomsoever, B. is, in technical language, the institute or an heir of entail (*i*). But as the *status* of institute is personal to one expressly called as disponee, a substitute heir, although he may come first to the succession by the decease before the entailer of one to whom the fee was *nominatim* destined, does not thereby acquire the character of institute (*k*).

4. *Heirs or substitutes.*—The character of heir or substitute of entail, as a party on whom the fetters are imposed, is borne by every successor in the right, after the institute, who is included in the terms of the destination, with the exception of the last person called to the succession, heirs-portioners and heirs whomsoever.

5. *Heirs-portioners.*—(1.) Where females are called to the succession, heirs-portioners are usually excluded in destinations by such terms as, *the eldest heir-female and the heirs of her body excluding heirs-portioners, and succeeding always without division.* The nature and purpose of a tailzie being to preserve the estate as one subject in the person of the member in possession, and the clauses of the deed being plainly inapplicable to a number of heirs, the devolution of the succession by the operation of the law upon more than one person necessarily evacuates the entail (*l*). But it does not follow that the non-exclusion of heirs-portioners in a succession which embraces heirs-female will of itself void the tailzie. Tailzies are not necessarily evacuated by containing within themselves the elements of their extinction, but are effectual so far and so long as they apply to the members, as sole proprietors, in the order of the destination; and although the fetters will necessarily fly off when the estate descends by the operation of the law to more than one individual, they continue binding whilst the destination supplies an heir who has or may have a successor entitled as a proper substitute to enforce their operation (*m*). (2.) Heirs-por-

tioners are in the position not of heirs whomsoever, but of the last substitutes, and being thus heirs of entail are not liable for the debts of a preceding heir (*n*).

6. *Heirs whomsoever.*—(1.) After the last member of the destination the entailer usually calls to the succession his own heirs whomsoever, or those of the last substitute. Originally it would appear that a destination to heirs-male of the body, called a male fee, was understood by the terms *feudum talliatum*, in contradistinction to *feudum simplex*, which descends to heirs whomsoever (*o*). We learn also from Craig, *deficientibus hæredibus in tallia contentis feudum ad dominum redire, etiamsi de hoc nulla fuit mentio;* and afterwards when the Crown came in the place of the superior, it was not as *dominus*, but as *ultimus hæres*, upon the failure of a destination to heirs-male, to the exclusion of heirs whomsoever (*p*). Thus, although Craig's definition of a tailzie is too limited for modern notions, it indicates the origin of the terms *heirs whomsoever*, as employed in the close of a destination. For as tailzies were thus at first limited to male succession, the destination was made to terminate on the *heirs-male whomsoever* of the maker or of the last substitute, in order to exclude the superior, and these terms naturally changed into heirs whomsoever, when it was no longer usual entirely to debar the succession of females. The terms heirs whomsoever became thus a mere expression of style to denote a fee-simple in the person of the heir of line, after the failure of the substitutes in the tailzie, so as to exclude the fisk, and was not construed as adding a branch to the destination (*q*). This interpretation was followed in a case decided soon after the enactment of the statute, in which it was found that a tailzied fee becomes simple, when it terminates on the heirs and assignees of the granter (*r*). (2.) But although the terms *heirs whomsoever*, are thus in the general case mere words of style, which do not continue the destination, the rule is subject to exceptions. Thus when used with reference to the heirs

of an intermediate substitute, his heirs whomsoever are made proper heirs of tailzie, because a future substitute forming a proper branch of the destination has a *jus crediti* to enforce the fetters against them; although in the event of heirs-portioners not being excluded, and coming to succeed, the tailzie is at an end (*s*). Thus also by excluding heirs-portioners and declaring that the fetters shall apply to the *heirs whomsoever* of the granter or last substitute, these may be made proper heirs of entail.

7. *Last substitute.*—(1.) A consequence of the fetters being inoperative against heirs whomsoever, is the freedom of the last substitute in the tailzie. As the heir whomsoever of the granter or of the last substitute is not an heir of tailzie, and thus not a creditor in the conditions and obligations of the entail, in which character only is it competent to complain of an act of contravention, he has no *jus crediti* and no title to pursue declarators of forfeiture against the last substitute, who may thus with impunity sell or burden the estate, or gratuitously dispose of it at pleasure; and as the same principle applies to any member of the destination against whom the limitations cannot be enforced, the institute, on the predecease of all the substitutes, may in like manner exercise the powers of a fee-simple proprietor (*t*). (2.) In these instances, it is of course to be understood that the last substitute and the institute, respectively, are so described as that the heirs of their bodies, if any should exist, would not bear the character of heirs of entail; but, by the Act of 1848, it is enacted, that the only heir of entail in existence for the time, and unmarried, may acquire the estate in whole or in part, in fee-simple, by executing and recording a deed of disentail in terms of the statute. Such acquisition will be absolute, to the exclusion of heirs of the body subsequently born (*u*).

(*a*) Dallas, 559-60.

(*b*) Ivory's Ersk. 3. 8. 24, and notes.

(*c*) Ersk. as above; Bell's Princ. 1747; Lord Chancellor Eldon in Agnew, 31st July 1822, 1 Shaw's Ap. 320 and 333.

(*d*) Shepherd, 7th Jan. 1844, 6 N. S. 464.

(*e*) Gordon, 23d Feb. 1791, M. 15,465. See Livingstone, 3d March 1762, M. 15,418.

(*f*) Wellwood, 23d Feb. 1791, M. 15,463; M. of Titchfield, 22d May 1798, M. 15,467, affirmed; Miller, 12th Feb. 1799, M. 15,471.

(*g*) Logan, 20th Dec. 1836, F. C., 15 D. 291, affirmed, 1st August 1839, M'Lean and Robinson, 790.

(*h*) Ivory's Ersk. 3. 8. 44; Bell's Princ. 1746.

(*i*) See Peacock *v.* Glen, 22d June 1826, F. C., 4 S. 742; Fogo, 25th Feb. 1840, 2 N. S. 651, and 11th March 1842, 4 N. S. 1063, H. of Lords, 11th Aug. 1843, 2 Bell 195.

(*k*) Mackenzie, 24th Nov. 1818, F. C.; affirmed, Shaw's App. 1. 150. Here the deed contained a clause dispensing with the delivery.

(*l*) Ersk. 3. 8. 32; Mure, 6th Feb. 1823, n. r., noticed in Mure below; E. March *v.* Kennedy, 27th Feb. 1760, M. 15,412; Sprot, 22d May 1828, F. C., 6 S. 833; Hunter, 11th Dec. 1834, F. C., 13 S. 185; Farquhar, 29th Nov. 1838, 1 N. S. 121; Craig, 21st Feb. 1839, N. S. 543. See opinion of Lord Medwyn as to effect of a subsequent *nominatim* substitution; Sands, 16th Jan. 1844, 6 N. S. 365.

(*m*) Mure, 16th Feb. 1837, F. C., 15 D. 581; affirmed, 18th May 1838, 3 S. and M'L. 237.

(*n*) Farquhar, 3d Feb. 1842, 4 N. S. 600.

(*o*) Craig, 2. 16. 3 and 19; see Ersk. 3. 8. 21; Somerville, 7th Dec. 1686, M. 2949.

(*p*) Craig, as above; Balfour, *voce Brieves*, c. 9.

(*q*) Ivory's Ersk. 3. 8. 32; Lord Corehouse in Mure, as in (*m*).

(*r*) Leslie, 15th Dec. 1710, M. 15,358; E. March, 27th Feb. 1760, M. 15,412.

(*s*) Stirling, 28th May, 1845, 7 N. S. 640.

(*t*) Ersk. 3. 8. 32; see Denham, B. S. 5. 623; E. March, as above; Henry, 13th June 1832, F. C., 10 S. 644; Colvill, 8th March 1843, 5 N. S. 861.

(*u*) 11 and 12 Vict. c. 36, § 3.

20. TERMS DESCRIPTIVE OF THE INSTITUTE.—In imposing the conditions, provisions, and restraining clauses of the entail upon the persons called in the destination, the ambiguity of expression which has occasioned so much litigation, has generally arisen from the use of descriptive words not sufficiently comprehensive. (1.) In an early instance, the distinction between the terms *institute and heir* was disregarded, the intention of the entailer to fetter the institute being manifest from the terms of the entail (*a*); but the strict rule of interpreta-

tion led afterwards to a different result. (2.) Thus in an entail where the destination was in favour of *the granter's second son, and the heirs whatsoever of his body, whom failing, &c.*, and the restraining clauses were directed simply against the *heirs of tailzie and provision*, the Court, disregarding the argument from probable intention, held that the son as disponee, and therefore not comprehended within the term heirs, was unlimited fiar of the estate (*b*). In a later case, the intention of the entailer received effect. The institute or disponee was described as an heir, which left no doubt as to the purpose of the entailer; but the decision was reversed on appeal, on the special ground, that "the appellant being fiar or disponee and not an heir of entail, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant and resolutive clauses laid only upon the heirs of tailzie" (*c*). (3.) The strict rule of interpretation being thus sanctioned by the authority of the Court of last resort, the result in future cases came therefore to depend on one of two questions, whether the party maintaining his freedom from the fetters was truly the institute or disponee; or whether, being the institute, the terms employed in the restraining clauses with reference to the members of the tailzie, did or did not comprehend him in that character. The former question has occurred in a numerous class of cases, and the Court, in judging of the distinction between an institute and an heir, have uniformly disregarded relationship, as well as the mere form of the deed, and held that party to be the disponee or institute to whom the estate is first destined in fee, whether he be the maker of the tailzie, or another, named after a reserved liferent, or a conditional disponee to whom the succession opens on the condition taking effect, or whether he be the heir of line of the entailer, or a stranger, and whether the tailzie be constituted in the strict form of a disposition, or in that of a procuratory of resignation (*d*). (4.) With respect to the terms proper for describing the

institute, the circumstances have in different instances necessarily varied. Thus the terms, *heirs and members of tailzie*, were held not to comprehend the institute, who in one clause was put in opposition to heirs and members (*e*). And it has in recent cases been uniformly held, that the clearest indication of an intention to fetter the person who is the undoubted institute or disponee, but expressed so as to refer to him as an heir of tailzie, is not enough to bring him within the scope of the restraining clauses (*f*). But as it is only necessary to employ terms sufficiently comprehensive, the words, *person or persons heirs of tailzie foresaid*, used with reference to the institute and substitutes, as contained in prior clauses of the deed, were construed to embrace both (*g*); and a similar interpretation was given to the words *heir or person so contravening*, occurring in the resolutive clause, with reference to prior clauses wherein the institute was named (*h*). But the terms *heirs of the body*, followed by the words, *other heirs of tailzie*, was denied its technical application to the *eldest son* as institute (*i*); and although the words *heirs male* of the body, with a similar addition, were in another instance sustained as sufficient to include the institute, the case is not to be relied on (*k*).

(*a*) Willison, 26th Feb. 1726, M. 15,458.

(*b*) Erskines, 14th Feb. 1758, M. 4406.

(*c*) Edmonstone, (*Duntreath*,) 24th Nov. 1769, M. 4409; as reversed, 15th April 1771.

(*d*) Bell, Princ. 1746, and auth. cit.

(*e*) Steele, (*Baldastard*) 12th May 1814, F. C.; affirmed, Dow, 5. 72.

(*f*) Morehead, 2d July 1833, F. C. 11 S. 863, as reversed, 31st March 1835, 1 S. and M'L. 29; Elibank, 2d July 1833, F. C., 11 S. 858; affirmed, 19th March 1835, 1 S. and M'L. 1; Brown, 11th March 1837, F. C. 15 D. B. M. 837; affirmed, 12th Feb. 1838, 3 S. and M'L. 84.

(*g*) Syme (*Blairhall*), 27th Feb. 1799, M. 15,473.

(*h*) Douglas, (*Dougaldston*), 14th Nov. 1823, F. C., 2 S. 487; affirmed, W. S. 1. 323. Buchanan, 25th Jan. 1838, 16 D. 358. See note by Lord Cuninghame.

(*i*) Opinion of consulted Judges, in Brown, as in (*f*).

(*k*) Bauch, 14th Jan. 1834, 12. S. 273; Opinion in Brown, as in (*f*).

21. TERMS DESCRIPTIVE OF THE SUBSTITUTES.—The

clauses of the entail must, in distinct terms, be directed against the heirs or substitutes. But few questions have occurred in reference to the description of the heirs, who, as forming the leading branch of the destination, are necessarily in the view of the framer of the deed. (1.) A difficulty may sometimes, however, arise, from the inaccurate use of terms descriptive of the species of heirs intended to be fettered. Thus, where an estate was destined by the entailer, (failing a prior series of heirs,) *to his grand-daughter A., and the heirs-male to be lawfully procreated of her body, whom failing, the heirs-female to be procreate of her body*, &c., and the prohibition to alienate was directed against the heirs in this latter branch of the destination, as the heirs-female of the maker of the entail, the heir-male of A. succeeding under the express destination to her heirs-male, was held not to be comprehended under the general term heirs-female as used in the prohibitory clause, notwithstanding that he was, in technical language, an heir female (*a*). (2.) The character impressed by the deed cannot be affected by the form in which an heir completes his title. Thus, a member of tailzie described as an heir, taking the estate as a judicial disponee under an adjudication in implement of a decree obtained for enforcing a clause of devolution in his favour, does not thereby lose the character of heir or substitute, so as to be entitled to maintain freedom from the fetters (*b*). Nor does an entry by declarator, in place of service, alter the status of an heir (*c*).

(*a*) Dalzell, 30th May 1809, F. C.
(*b*) Henderson, 12th Nov. 1796, M. 15,442.
(*c*) Mackenzie, 24th Nov. 1818, F. C.

22. PRACTICAL RULES.—The rules deducible from the cases noticed above, seem to be these: (1.) In directing the conditions and the other clauses of the deed against the institute and heirs of tailzie, caution is required in framing a general description. Thus, the *whole persons*, or *heirs*

and persons, or *any of the persons foresaid*, or *my said disponee and the heirs of tailzie foresaid*, appear to have been held sufficiently comprehensive. (2.) In practice it is usual, as it is more perspicuous, to repeat the name of the institute, when he is in existence, followed by the words, *and the heirs of tailzie foresaid*, (not of course the *other* heirs,) at the commencement of each of the clauses which come after the destination. Where again the institute is unborn, the correct form of expression seems to be, *the said heir-male of my body*, (or other words distinctly descriptive of the institute,) *and the heirs of tailzie foresaid.* (3.) If the entail is mutual or for onerous causes, the fetters may be imposed on the entailer. (4.) As there is no ascertained form of words by which heirs-portioners can be subjected to the fetters of the entail, it is proper, when female succession is not excluded, to declare in the destination that the eldest heir-female shall, in all cases, succeed without division (*a*). These rules, and the observations on which they are founded, manifestly apply not only to the conditions, but to the provisions and restraining clauses of the deed. It will therefore be unnecessary again to refer to the mode of describing the *persons* whom it is intended to restrain.

(*a*) See note (*a*), p. 14.

23. PROHIBITIONS.—(1.) The prohibitory clauses of the entail qualify the dispositive clause and form the substantial part of the deed, the purpose of which, in other respects, is chiefly to make these effectual. They are also styled *limitations* or *restrictions;* and although these terms are employed in the plural number, they have but a single object—to preserve the succession in the family or line of descendants to whom the estate is destined. The purpose of the maker of a tailzie is simply to protect the destination; and with that view, he prohibits any alteration of the order of succession,—an alteration which may be produced in three several modes,—by gratuitous

destination or settlement, by direct and onerous conveyance, or by indirect alienation by the diligence of the law. The prohibitions are therefore specially directed against, *first*, Alteration of the tailzie; *secondly*, Selling or disposing, for onerous considerations; and *thirdly*, Contracting debt which shall affect the lands; but subject to these limitations, or such of them as may have been effectually imposed, each person called to the succession is uncontrolled fiar. These modes of taking heritage out of a particular line of succession, viz. destination, alienation and adjudication, being separate and distinct in form, it arose from the presumption in favour of the free transmissibility of feudal rights, that the omission of any one of them inferred the absence of intention on the part of the entailer to exclude that particular form of alteration. (2.) Of the structure of the prohibitive clause it may be observed, that a limitation, to be binding, must be expressed, and will not be inferred by implication from another part of the clause. Hence the rule that each of the three leading prohibitions must be expressed in a substantive form. Thus, a prohibition to sell can never import a prohibition against contracting debt, nor is either embraced by a prohibition to alter the order of succession (*a*). This rule is the more necessary to be observed, that the three principal acts prohibited all substantially produce the same result, the disappointment of the future substitutes of entail; as is exemplified by the result of a number of early cases which are noticed under the several heads of the prohibitory clause. One marked example of the effect of the rule is furnished by two cases long separated as to time, but relating to deeds nearly identical in terms, prepared, as it would appear, according to the form given in Spottiswoode's Styles, and in common use at the time. The first is the case of the Lochbuy entail, where the terms relied on as forming a prohibition against altering the order of succession were a mere appendix to the prohibition against contracting debt,

in the words, *or any deed whereby the hopes of succession of the succeeding members may be in any measure evaded.* And these, as sufficiently expressive of an alteration of the order of succession, were held to exclude the faculty to make such an alteration. More recently, however, in a case where the words were similar, a different view prevailed founded on the rule alluded to, which had been supported by a long train of decisions with the single exception of the case of Lochbuy; and although the Court conceiving this case to form a precedent which it would be dangerous in a practical view to overturn after so long a period, altered the judgment of the Lord Ordinary, it was supported on appeal (*b*). (3.) The omission of part of the ordinary prohibitions does not directly invalidate the entail, which is binding in as far as these extend; but, even in questions among the members of tailzie, a prohibition against altering the destination is no ground for inhibition or interdict, where alienation or the contraction of debt is not expressly debarred (*c*). Nor is the omission of an effectual prohibition against sales a ground for laying upon an heir of entail the debts of a prior heir, as is that of a prohibition against the contraction of debt, because it is only the latter which subjects the estate to the diligence of creditors (*d*). (4.) An act which is specially prohibited cannot, however, be performed under a power which is reserved or not excluded; *e. g.* a collusive sale or an adjudication for a fictitious debt (although debts and deeds are not prohibited) will not enable the member in possession by arrangement with the pretended purchaser or creditor, to effect an alteration of the line of succession (*e*). (5.) But the omission to prohibit the contracting of debt will enable the heir in possession effectually to warrant a *bona fide* deed, (*e. g.* a tack of an endurance beyond the ordinary period,) so as to exclude any interest on the part of succeeding heirs to reduce the transaction (*f*). (6.) A prohibitive clause in the most perfect form is still a mere branch of the entail. Without the protec-

tion of the statutory irritances it has no effect as against onerous alienations. (7.) By the late Act it is declared, that entails defective in any one of the leading prohibitions against sale, contraction of debt, and alteration of the succession, shall, after the passing of the Act, (14th Aug. 1848,) be invalid and ineffectual as regards all the prohibitions (*g*).

(*a*) Ersk. 3. 8. 29; Scott Nisbet, Nov. 1763, M. 15,516, affirmed; Stewart, 8th July 1789, M. 15,535.

(*b*) M'Laine, (*Lochbuy,*) 23d June 1807, M. App. *Tailzie*, 14; Lang, (Overton,) 23d Nov. 1838, 1 N. S. 98, as reversed, Aug. 1839, 1 M'L. and R. 871. See note of the Lord Ordinary, (Jeffrey,) and the judgments of the Lord Chancellor, (Cottenham,) and Lord Brougham, on appeal.

(*c*) Ersk. as above; More's Notes on Stair, clxxvi. and cases cited; Cathcart, 12th Feb. 1830, F. C., 8. S. 497; affirmed, 18th July 1831, 5 W. S.; Cochrane, 21st Feb. 1844, 6 N. S. 723.

(*d*) Caddell, 11th July 1845, 7 N. S. 1014; Dewar, 16th Nov. 1845, 8 N. S. 90.

(*e*) Cathcart, as above. See Syme, 3d March 1821, F. C.

(*f*) Oliphant, 1st July 1830, F. C., 8 S. 985.

(*g*) 11 and 12 Vict. c. 36, § 43.

24. PROHIBITION TO ALTER (*a.*)—(1.) In framing the limitation against altering or infringing the course of succession, although it is advisable to adhere closely to the usual style, it is not essential to employ any particular form of expression, so that the meaning be clear. (2.) Thus a prohibition against doing any thing *in hurt and prejudice of these presents and of the foresaid tailzie and succession* (*b*); or *any other fact or deed in prejudice of the said tailzie, and of the persons above named, and their foresaids*, introduced immediately after the prohibitions against selling and contracting debt; or *selling or contracting debt, or doing any other deed whereby the lands may be any ways affected*, has been sustained as effectual (*c*). A similar result took place where the words were, *or any deed whereby the hopes of the succeeding members thereto may be in any measure evaded*, followed immedi-

ately by the prohibition to contract debt, so as to appear as referring to a defeat of those hopes by the indirect means of adjudication, but in a recent case this determination has been regarded as an exception from the rule which requires that each prohibition shall be in a substantive form, and an opposite judgment was the result (*d*). (3.) Again, when the acts prohibited relate merely to the defeat of the destination by the diligence of the law, or by a sale, or by both or either of these means (*e*); the heir in possession may alter the course of succession by voluntary conveyance; and that although another clause of the entail should bear express reference to a prohibition against any such alteration as contained in the deed (*f*). (4.) The only exception to this prohibition usual in practice, is expressed in the Style-book (*g*), and is introduced to prevent questions arising out of the forfeiture of a particular heir; but it is competent to restrict the present or any other limitation to a particular heir or heirs (*h*). (5.) It is not necessary that the members of tailzie should be restrained from adding to, as well as altering the order of succession. Such a power is excluded at common law by the member assuming possession of the lands, under the conditions of the deed (*i*). The want of this prohibition seems to leave the members of the tailzie at full liberty to make a new entail, containing additional restrictions (*k*); and it has been maintained that the creditors of a member of tailzie not affected by the prohibition, may adjudge the estate, or at least their debtor's faculty to alter the succession (*l*).

(*a*) And with and under the PROHIBITIONS under written viz. with and under this prohibition and restriction that it shall be nowise lawful to nor in the power of (*the institute*) or any of the heirs or substitutes of tailzie above written to innovate alter or infringe this present tailzie or the destination and order of succession hereby established.

(*b*) Innes, 23d June 1807, M. App. *Tailzie*, No. 13; affirmed on ap.

(*c*) Ure, 17th July 1756, M. 4315; Rowe, 9th Feb. 1837, F. C., 15 D. B. M. 500. See also Campbell, 22d Dec. 1837, (Scottish Jurist,) relative to the same entail, and note to Lord Cuninghame's interlocutor.

(*d*) Maclaine, 23d June 1807, M. App. *Tailzie*, 14; Lang, 23d Nov. 1838, 1 N. S. 98, as reversed 16th Aug. 1839, 1 M'L. and R. 871.

(*e*) Brown, 25th May 1808, M. App. *Tailzie*, No. 19; Gilmour, 5th July 1838, 16 D. B. M. 1261; Stewart, 8th July 1789, M. 15,535; Henderson (Earshall), 21st Nov. 1815, F. C.; Oliphant, 7th June 1816, F. C.; Braimer (Balfour), 18th January 1839, 1 N. S. 283; Trotter's Trs., 10th March 1840, 2 N. S. 826.

(*f*) Tytler *v.* Grant, 9th March 1826, F. C., 4 S. 541, and case of Dickson therein referred to.

(*g*) Jurid. Styles, 1. 228.

(*h*) It is hereby declared that the foresaid conditions prohibitions clauses irritant and resolutive provisions and declarations (*or such of them as it may please the entailer to express*) are for certain weighty causes and considerations to be binding upon and affect the said B. alone but are not to affect any of the other heirs of tailzie above mentioned; (see E. of Fife, as below.) —The same object will be attained by specifying the members of tailzie whom it is intended to restrain, and omitting the other heirs and substitutes.

(*i*) Menzies, 25th June 1785, M. 15,436; Meldrum, 29th June 1827, 5 S. 857; E. of Fife, 7th March 1828, F. C., 6 S. 698; Bell's Princ. 1759.

(*k*) More's Notes on Stair, clxxx.

(*l*) See Brown, 11th March 1837, 15 D. B. M. 1837.

25. PROHIBITION TO ALIENATE.—1. *Terms.*—This limitation may be expressed as in the notes (*a*). As respects the persons restrained, the rules above noticed apply. (1.) This prohibition, although directed against acts which, in ultimate effect, produce an alteration of the order of succession, is not inferred from words which plainly import only a change of the destination. Thus, a prohibition *to alter, innovate or infringe the foresaid tailzie, or the order of succession therein appointed, or the nature or quality thereof any manner of way (b);* or *to do any facts or deeds in prejudice of the other heirs, their right of succession* (*c*), does not restrain the heir in possession from selling the lands. (2.) But as it is enough to employ terms which mark the purpose of the entailer, a prohibition *to squander or put away the estate, or any part thereof, vel faciendo vel delinquendo, any ways contrary to this present settlement*, has been held effectual (*d*). Thus also the terms, *annailzie and dispone*, or simply *dispone*, include disposal by sale (*e*).

2. *Absolute conveyances.*—(1.) Conveyances for

onerous considerations for the purpose of absolute transmission, are obviously included under the prohibition; but sales described as *redeemable*, are truly securities, and not barred by this clause (*f*). (2.) In a sale of teinds which is competent under the Act of 1617, the price does not belong to the proprietor for the time, but is subject to reinvestment under the fetters of the entail (*g*).

3. *Feu-rights.*—It has been assumed, in numerous instances, that grants in the shape of feu-rights, even for an adequate feu-duty, are alienations in the sense of the statute (*h*). In practice, the understanding is uniformly acted on.

4. *Provisions to Widows.*—(1.) Provisions to husbands and widows, in so far as they exceed the legal rights of terce and courtesy, fall within the scope of the prohibition (*i*). (2.) The terce itself may be excluded by express words, for, although a legal and not a conventional provision, as it is measured by the husband's sasine, the terce cannot be due where that sasine excludes it. The right of terce is, indeed, weaker than an heritable security, to which it is postponed, and that burden does not affect a strictly entailed estate. Were the terce, therefore, incapable of being excluded, the anomalous result would follow, that the widow of an entailed proprietor would be better secured in her legal rights than the widow of an unlimited fiar. Terce and courtesy are analagous rights: they are merely a legal distribution of the estate, and may be excluded by the style of an entail (*k*).

5. *Leases.*—Under the prohibition *to sell, alienate, dispone, burden, dilapidate or put away*, are included leases of an unusual endurance (*l*). The terms, *dispone, alienate, and put away*, as used in deeds of entail, have, after much discussion, been held synonymous. The term, alienate, was, at one period, considered to have a more comprehensive application than dispone, and, in common acceptation, the difference is well marked. The Court, therefore, gave effect to the former, as embracing leases of un-

usual duration, but refused it to the latter (*m*); but in the House of Lords, alienate and dispone were regarded as equivalent terms,—an interpretation which has since been followed (*n*). The terms, *away put*, were taken in a broader sense than even, alienate, before the reversal in Elliot's and other cases (*o*).

6. *Endurance of Leases.*—(1.) Leases of an unusual endurance have uniformly been regarded as alienations; but the Court have not determined the precise question, What is the proper term of an agricultural lease? (*p*). It has been observed, that the term of a lease of this nature may vary according to the custom of different districts, as influenced by circumstances (*q*). (2.) In an early case it was maintained, that a lease for even nineteen years was an alienation, and that a member of tailzie could not set tacks to endure beyond his own lifetime; but in one branch of the Queensberry cases, a lease granted for twenty-nine, twenty-seven, twenty-five, twenty-one, or nineteen years, "whichever of the said several term of years, (short of the period of thirty-one years,) the Court of Session or House of Lords shall find to be the longest period" for which the heir in possession had power to grant a lease, was sustained for the term of twenty-one years (*r*). That period may therefore, perhaps, be regarded as the *maximum* of an agricultural lease, contradistinguished from an alienation. (3.) Leases in direct contravention of the tailzie as to powers, are not valid, even for the ordinary period of an agricultural lease (*s*); but where the term of endurance is within the power of the member in possession, for example, nineteen years, it does not invalidate the lease that there is an obligation to renew annually during his lifetime (*t*). In regard to leases authorised by statute, see *Relaxations*.

7. *Grassum.*—(1.) Leases even of ordinary duration, when a fine or grassum (which is regarded as anticipated rent) has been accepted for a reduction of the rent, and generally all leases granted *in fraudem* of the entail,

fall under the prohibition to alienate. (2.) In construing a clause prohibiting alienation, but permitting leases *without diminution of the rental, at least at the just avail for the time*, it is held that these last words mean a fair value at the time of leasing; that *rental* and *rent* occurring in such a lease are equivalent terms; that an heir in possession taking a grassum effects a diminution of the rental or rent, and does not take the just avail for the time; that a lease granted at the old rent, on a renunciation of a former lease, which rent had been fixed with reference to a grassum, is a lease with diminution of the rental; and that a lease is exceptionable in which the rent payable during the granter's lifetime, or for a certain period from its date, is greater than the rent stipulated for the remainder of the lease (*u*). (3.) A prohibition to alienate is controlled by a clause permissive of leasing, to the extent of the permission; and in the absence of such a prohibition, unless there be a restriction specially applicable to them, leases may be granted for grassums, and without limit in respect of endurance (*v*).

8. *Leases of coal, mansion-house, &c.*—(1.) The proper term of endurance, independent of statute, of leases of coal, and other mines and minerals, and of fishings, has not been determined. (2.) A lease of the mansion-house, gardens and pleasure ground around the house, (which are not entered in the rent roll of an estate, or in use to be let,) cannot be granted to the prejudice of future heirs (*w*).

9. *Cutting wood.*—When it is intended that the member in possession shall have power to cut wood only to a limited extent, the amount of the privilege ought to be carefully defined. The prohibition to alienate or dilapidate does not include the cutting down of full-grown wood, and a future heir cannot in the general case interfere with the operations of the member in possession, although he should offer the full value of the timber which it is proposed to cut down (*x*). The Court have, in more

than one instance, exercised an equitable control when the evident purpose or tendency of those operations was, to dilapidate the estate by cutting young and unripe wood, or timber necessary for the comfort and amenity of the mansion-house (*y*).

10. *Thirlage.*—This limitation strikes against thirlage of any part of the lands to a mill not belonging to the entailed estate (*z*).

11. *Propelling the succession.*—It is not an alienation to convey the estate to the next heir of tailzie, being the heir *alioqui successurus, (the heir-apparent,* not the *heir-presumptive,)* which is called propelling the succession; nor is the course of succession thereby changed. It cannot, therefore, be excepted to as an act of contravention (*aa*).

(*a*) And with and under this prohibition and restriction also that it shall not be lawful to nor in the power of my said disponee or any of the heirs of tailzie foresaid to sell alienate or dispone the said lands and estate, or any part thereof either irredeemably or under reversion.

(*b*) Campbell, 17th June 1746, M. 15,505; Sinclair, 8th Nov. 1749, M. 15,382.

(*c*) Nisbet, Nov. 1763, M. 15,516; affirmed, 20th March 1765.

(*d*) Cuming, 29th July 1761, M. 15,513.

(*e*) Hepburn's Creditors, 8th Feb. 1758, M. 15,507; Elliot, 19th May 1803, M. 15,542.

(*f*) E. of Eglinton, 14th Feb. 1845, 7 N. S. 425.

(*g*) 1633, c. 17; Trust. of D. of Hamilton, 26th June 1818, F. C. See Connell on Tithes, 1. 480, and unreported cases cited.

(*h*) See Cathcart, as in (*u*); Ker *v.* Innes, 23d Jan. 1807, M. App. *Tailzie*, No. 18; affirmed, Dow, 2. 149; M. of Abercorn, 26th Jan. 1816, F. C.

(*i*) Ivory's Ersk. 3. 8. 30, and notes; Bell's Princ. 1751; Sandford on Ent., 366, *et seq.*

(*k*) Bell's Princ. as above; Gibson, 24th Nov. 1798, M. 15,869. The clause is in these terms: "Which liferent locality so to be provided to wives is hereby declared to be in full satisfaction to them of all they can ask or claim of the law in name of terce declaring that although it shall happen any of the heirs of tailzie above specified to fail in providing their wives conform to the above-written reservations to that effect yet the said wives shall have no manner of right to the terce or any other legal provision upon or out of the said lands and estate notwithstanding any law or practice to the contrary."—Macgill, 13th June 1798, M. 15,451.

(*l*) See Craig, 3. 3. 22; Stair, 2. 11. 13; Ivory's Ersk. 3. 8. 29, and

notes; Bell's Princ. 1752; Hunter's Landlord and Tenant, 1. 69, *et seq.*, 82.

(*m*) Elliott, 10th March 1814, F. C.; Hamilton, 3d March 1815, F. C. Stirling, 20th Feb. 1821, F. C.

(*n*) Queensberry Leases, 30th March 1819, 1 Bligh, 339; Elliot as reversed, 14th March 1821, 1 S. (Ap.) 16, 89; Anstruther, 26th Nov. 1840, 3 N. S. 142.

(*o*) Innes *v.* Mordaunt, 9th March 1819, F. C.; affirmed, 5th July 1822, 1 Shaw, (Ap.) 169.

(*p*) Ivory's Ersk. as in (*l*); Hunter's Landlord and Tenant, i. 86, *et seq.* and auth. cit.; Bell's Princ. 1752. See Malcolm, 17th Nov. 1807, M. App. *Tailzie*, No. 17; affirmed, Dow, 2; Turner, 17th Nov. 1807, *ib.* No. 16; affirmed, 1 Dow, 423; Henderson, 18th May 1814, 2 Dow, 285; Queensberry Leases, 30th March 1819, Bligh, 1. 339.

(*q*) See More's Notes on Stair. clxxxv.

(*r*) Wemyss, 12th June 1822, F. C., 1 S. 483. See Bell's Princ. 1752.

(*s*) Gordon, 22d Nov. 1822, 2 S. 28.

(*t*) Queensberry Leases, as above.

(*u*) Last reference; Malcolm, 19th June 1823, 2. S., 366.

(*v*) Bell's Princ. 1752; Hunter, as in (*p*); E. Elgin, 13th June 1821, 1 S. (Ap.) 44.

(*w*) Cathcart, 31st Jan. 1755, M. 15,399, 15,403, B. S. 5. 515; affirmed on ap.; Leslie, 2d March 1779, M. 15,530, 2 Hailes, 832, affirmed. See Turner, 6th Dec. 1811, F. C.

(*x*) Hamilton, 16th Feb. 1757, 15,408.

(*y*) Bell's Pr. 1754: Mackenzie, 6th March 1824, 2 S. 775; Cathcart, as in (*w*); Bontine, 17th Nov. 1827, 6 S. 74.

(*z*) Rank. of Balgair, 7th Dec. 1763, B. S. 5. 622.

(*aa*) Craigie, 4th Dec. 1817, F. C. See Gordon, 14th Nov. 1749, M. 15,384; Suttie, 6th July 1758, B. S. 5. 866; Macleod, 17th Nov. 1827, F. C., 6 S. 77.

26. PROHIBITION TO CONTRACT DEBT (*a*).—(1.) This prohibition is plainly intended for the benefit of the substitutes of tailzie, and of them only. For those substitutes and no other persons have the statutory clauses any force; but their title to complain of acts of contravention does not qualify the feudal right. It must be exercised, and may therefore, like any other right of action, be lost by the negative prescription. Thus, there seems no reason to doubt that an heritable security granted over entailed subjects, if not itself extinguished by prescription, will become available against the substitutes of tailzie, if they neglect to set aside the security, or resolve the right of

the contravener, within the forty years; and it is well ascertained, that the possession of an heir on a fee-simple title for that period works off the whole fetters of the tailzie. But if the substitutes of entail have the sole title to resist the contraction of debts as against the estate, it follows that the acts and deeds and debts of the last substitute are effectual against his heir whomsoever, who is not an heir of tailzie; (above, § 19.) On the same principle, when the entail comes to an end by the operation of the law, *e. g.* where, by the forfeiture of the right of the member in possession, the estate passes to the Crown freed and discharged of all limitations, substitutions and remainders, the Crown has been held to be in the situation of the heir whomsoever of the last substitute, and not entitled to found upon clauses intended for the benefit of substitutes of entail only, so as to take the estate free of the debts of the forfeiting person (*b*). (2.) The prohibition to burden, or to contract debt, so as to affect the lands, is subject to the rules of construction which regulate the other limitations. The restraint must be imposed in a substantive shape, and is not to be deduced by implication. Thus, a prohibition *to alter, innovate or infringe the tailzie, or the order of succession therein appointed, or the nature or quality thereof in any manner of way*, does not disable the member in possession from burdening the estate. But the terms, *to contract debt on the lands, or to burden the same in whole or in part, with debts or sums of money*, are sufficiently comprehensive to include personal debts as well as securities over the lands; for although both phrases strictly imply voluntary contractions only, and do not embrace judicial burdens by adjudication, yet the meaning of the entailer is clear, to prevent the lands from being burdened with debts in any form (*c*). It is advisable, however, to employ the ordinary words of style. (3.) It has been questioned, but without success, if the member in possession does not incur an irritancy by contracting personal debts (*d*). (4.)

As the purpose of the entailer is to preserve the estate to the series of heirs expressed in the destination, and not to exclude each possessor in his turn from the full liferent use of it, the lands may be charged with debt by way of annuity, if restricted to the lifetime of the heir in possession, without operating as a contravention of the tailzie. Voluntary securities and liferent trusts over entailed estates, so limited, are accordingly common in practice. (5.) The prohibition against burdening the lands necessarily excludes the power to grant provisions to children under the entail (*e*), or meliorations to tenants (*f*), so as to affect the estate or the succeeding heirs. (6.) The absence of an effectual prohibition subjects the heir in possession in payment of his predecessor's debts (*g*).

(*a*) AND under this prohibition also, that it shall not be lawful to nor in the power of my said heirs of entail to contract debts grant bonds or other deeds or writings or do any act civil or criminal which shall be the ground of any adjudication eviction or forfeiture of the said lands and estate or any part thereof or any ways affect or burden the same nor shall the said lands and estate be affectable by or subject to any terces or courtesies to the wives or husbands of the said heirs of entail which are hereby excluded.

(*b*) Creditors of Cromarty, 25th Feb. 1762, M. 15,417.

(*c*) Mackenzie, 23d May 1823, F. C., 2 S. 331; Haggart, 19th Dec. 1820, F. C.; Nisbet, 10th June 1823, F. C., 2 S. 381; Lindsay, 2d March 1842, 4. N. S. 843, affirmed 5th Sept. 1843, 3 Bell, 254.

(*d*) Denham, 15th Dec. 1737, B. S. 5. 200.

(*e*) Ivory's Ersk. 3. 8. 30, and notes; Borthwick, Feb. 1730, M. 15,556.

(*f*) Hunter's Landlord and Tenant, 2. 224, *et seq.*

(*g*) Sinclair, 18th July 1845, 7 N. S. 1085.

27. PROHIBITION AGAINST ADJUDICATIONS. (*a*).—(1.) The last of the prohibitions in the entail is against permitting special adjudications to pass against the lands, which can only be done with the concurrence of the member in possession. It is competent, however, to adjudge the life-interest of the member in possession without a breach of the prohibition. This may be done in the form of an adjudication of the life-interest merely, or of the lands themselves, under the express qualification that the security shall, *ipso facto*, be extinguished and the lands re-

deemed by the death of the debtor, and that its effect, as against the lands, shall then absolutely expire. The latter form is obviously the preferable, as warranting infeftment in, and consequently possession of the lands themselves during the debtor's lifetime; and, in competition, it will exclude a mere infeftment in the life-interest (*b*). (2.) Every form of diligence and process, even judicial sale, is competent, which goes merely to affect and attach the life-interest of the member in possession, and that, if duly qualified, a decree of adjudication or of sale will not operate as a contravention of the entail (*c*). (3.) It seems to have been assumed that liferent securities and conveyances fall on the forfeiture through an act of contravention of the right of the party granting them; for such burdens and conveyances although said to be granted to exist during the lifetime of the heir in possession, are truly made and imposed for no longer a period than the existence of the heir's interest in the lands, an interest which may expire by forfeiture as well as by death. But by the late statute, it is provided that no irritancy shall affect any conveyances, deeds, or securities granted to purchasers or *bona fide* onerous creditors, prior to the execution of a summons of declarator (*d*).

(*a*) And also with and under the prohibition and condition that it shall not be lawful to the said (*institute*) or the heirs of tailzie foresaid or any of them to consent suffer or permit that any special adjudication be obtained or passed of any part of the foresaid lands and others before disponed for any sum of money or debts whatsoever.

(*b*) See Graham, 14th Nov. 1828, F. C., 7 S. 13; and 19th July 1833, W. S. (Ap.) 518.

(*c*) Ferrier, 11th July 1835, 13 S. 1121; Scottish Union Company, 19th Jan. 1839, 1 N. S. 532.

(*d*) 11 and 12 Vict. c. 36, § 40.

28. RELAXATIONS. As the *prohibitions* now constitute the tailzie, the most proper and stringent irritant and resolutive clauses being implied when the deed contains a clause for its registration in the Register of Entails, this

seems the proper place for giving a combined view of the powers introduced by the late and prior acts.

29. THE MONTGOMERY ACT AS TO LEASING (*a*).—This is entituled "an Act to encourage the improvement of lands, tenements and hereditaments in that part of Great Britain called Scotland, held under settlements of strict entail," and has a threefold object, (1.) an enlargement of the powers of heirs of entail as to leasing; (2.) to authorise the expenditure of money on the improvement of entailed estates; and, (3.) the exchange of limited portions of such estates for other lands.

1. *Improving Leases.*—(1.) The Montgomery Act authorises proprietors of entailed estates to grant tacks for any period not exceeding fourteen years after the next term of Whitsunday, and for one existing life in addition; or for the lives of two persons in being at the date of the lease, and the life of their survivor; or for any period not exceeding thirty-one years from such term of Whitsunday (*b*). (2.) But as the two latter classes of leases sanctioned by the statute are improving leases, it is enacted that every lease for two lives shall oblige the tenant to fence and enclose the lands in a sufficient and lasting manner, within thirty years, and two-thirds of them within twenty years, and one-third within ten years, if the lease shall endure so long; and that every lease for more than nineteen years shall oblige the tenant so to fence and enclose the whole subject of the lease during its endurance, and two-third parts of it during two-third parts, and one third-part during one third-part of that term (*c*). (3.) The tenant is to be taken bound to keep, preserve and leave the fences in sufficient repair; and it is provided that enclosures shall comprehend no more than forty acres in one field, except in the case of hills or other grounds incapable or improper for culture by the plough (*d*).

2. *Building Leases.*—(1.) Power is given to grant leases, for the purpose of building, for any period not exceeding ninety-nine years (*e*). (2.) But no person

shall hold more than five acres either in his own name or by means of other persons in trust; and the act declares, and the lease shall declare, that it shall be void, if, within ten years from its date, one dwelling-house for every half acre shall not be built, which is required to be kept in good tenantable and sufficient repair; and the lease is declared to be void whenever there shall be a less number of houses kept in such repair (*f*). (3.) From the powers given by the Act are excepted the manor-place, office-houses, gardens, orchards, and enclosures adjacent to it, which have usually been in the natural possession of the proprietor, or not usually let for more than seven years, except during minorities; and no lease shall be granted for building villages or houses within three hundred yards of the manor-place (*g*). (4). All leases are declared to be null which shall be granted for a rent under the last rent, or for a grassum or other benefit except the rent, or dated upwards of one year before the termination of an existing lease granted for a time certain (*h*). (5.) The conventional powers of leasing in tailzies are reserved entire (*i*).

(*a*) 10 Geo. III. cap. 51, (*See App.*)
(*b*.) The Act, § 1.
(*c*) The Act, § 2.
(*d*) The Act, § 3.
(*e*) The Act, § 4.
(*f*) The Act, § 5.
(*g*) The Act, § 6.
(*h*) The Act, § 7.
(*i*) The Act, § 8.

30. INTERPRETATION OF THE ACT.—But few cases have occurred on the construction of this statute. (1.) It has been held that the clause prohibiting a grassum or other benefit extends to every benefit of any kind different from the rent, and that an undertaking by the lessee to pay the granter's debts, must be held to be such benefit (*a*). (2.) But the benefit must be clear. Thus in a question with a

party not the former tenant, the terms "last lease" are strictly interpreted, and it is irrelevant to allege that a prior lease, of which that was a renewal, had been granted in part consideration of a grassum (*b*). (3.) The Act does not apply to entails dated on or after 1st August 1848 (*c*).

(*a*) Mure, 22d Dec. 1808, F. C.
(*b*) D. of Buccleugh, 24th Nov. 1827, 6 S. 128.
(*c*) 11 and 12 Vict. c. 36, § 12.

31. THE ROSEBERY ACT, AS TO LEASING.—(1.) The statute commonly called the *Rosebery Act*, (*a*), has relation to *Leases* of a proper agricultural kind and of mines and minerals, *excambions*, and *sales* for the payment of entailer's debts. (2.) As respects leases, it provides that notwithstanding the prohibitory, irritant and resolutive clauses contained in any entail made and established, or to be made and established under the Act of 1685, it shall be lawful for the respective heirs of entail (including the *institute*) in possession to grant tacks of any part of the entailed lands, estates or heritages, either by public roup or private bargain, for any period not exceeding twenty-one years, for the fair rent at the period of leasing, and that notwithstanding a prohibition against diminution of the rental, and to grant tacks of any mines or minerals contained in such lands and estates for any period not exceeding thirty-one years. (3.) These powers are qualified by two provisions, namely, 1st, that nothing in the Act contained should authorise any heir of entail in possession to take any grassum or valuable consideration other than the tack-duty or rent, for granting any tack, or to grant any tack of the home-farm, or of the mansion-house and offices, or of the garden, lawn, park or policy attached thereto, for any period beyond his own life. A nullity is declared in the event of any such grassum or consideration being taken, or any tack granted contrary to the Act; 2d, That nothing in the Act contained

shall prevent the heir of entail in possession from exercising any more extensive power of leasing contained in the entail (*b*). (4.) The Act applies to all entails, whether executed before or after 1st August 1848; but as the powers conferred by the Rosebery Act were operative only under entails duly made and established, and therefore recorded in the Register of Entails, they were by a later statute extended to heirs of entail possessing under deeds of entail not recorded under the statute of 1685 (*c*).

(*a*) 6 and 7 Will. IV. c. 42.
(*b*) The Act, § 1, 2, 20.
(*c*) 1 and 2 Vict. c. 70, in Appendix.

32. LEASING FOR SPECIAL PURPOSES.—By an Act of the 3d and 4th of the Queen, entailed proprietors are empowered under certain regulations, to grant in feu, or lease on long leases, portions of their estates for the purpose of building Churches and Schools, and dwelling-houses for the ministers and masters thereof, with suitable gardens for such houses (*a*). Reference is made to the Act in the *Appendix*.

(*a*) 3 and 4 Vict. c. 48.

33. THE RUTHERFURD ACT, AS TO LEASING.—(1.) The statute of the 11th and 12th of the Queen, cap. 36, as respects leases, provides that it shall be lawful for any heir of entail (including the institute) in possession, being of full age, with the like consents as would enable him to disentail the estate, to lease the estate in whole or in part, under the authority of the Court of Session, unconditionally, or subject to conditions, restrictions and limitations, according to the tenor of such consents, and to execute the deeds necessary for that purpose (*a*). This provision applies to all entails, *existing* and *future*. It is to be noted, that the powers conferred by the prior clause as to disentailing the estate, on the heir in possession being "the only

heir of entail in existence for the time, and unmarried," are not repeated in the clause as to leases. (2.) By a subsequent clause it is enacted that, notwithstanding any prohibitory, irritant and resolutive clauses, contained in any tailzie *dated prior to* 1*st August* 1848, the heir in possession shall have power to grant *long leases* of any part of the estate not exceeding, in all, one-eighth in value, exclusive of the mansion-house, offices and policies of the estate, for the highest rent that can be got; but, under the *proviso* that it shall not be lawful to take any grassum, or fine, or valuable consideration except the rent, for granting any lease, and the sanction of nullity is added, as respects leases granted for a grassum and generally as to prohibited leases. But any more extensive powers contained in the entail are reserved entire (*b*). (3.) The Act does not affect the powers referred to in § 31.

(*a*) 11 and 12 Vict. c. 36, § 4. See *Powers of disentailing.*
(*b*) The Act, § 24.

34. STATUTORY POWERS AS TO IMPROVEMENTS.—1. *The Montgomery Act.* (1.) The principle, now held to be erroneous, on which this Act proceeded, was the benefit of the personal representatives of the heir in possession who should expend money on improvements, at the expense not of the estate but of the succeeding heirs, thus imposing a growing burden on the remoter heirs, while the advantage derived from the improvements was yearly diminishing. (2.) The preamble of the Act sets forth, that it might be highly beneficial to the public if proprietors of entailed estates were encouraged to lay out money in enclosing, planting or draining, or in erecting farm-houses, and offices or out-buildings for the same, upon their estates, and that they might be induced to do so, if they and their representatives were secured in recovering from the succeeding heirs of entail, a reasonable satisfaction for the money so expended.

2. *Ordinary Improvements.*—(1.) It was accordingly

enacted that every entailed proprietor who lays out money in such improvements should be a creditor to the succeeding heirs for three fourth-parts of the amount of his expenditure, but under certain provisos which have, in their practical operation, been found to be of a very stringent nature (*a*). (2.) 1st, The amount expended shall not form a valid claim by the representatives of such proprietor for more than four years' free rent, after deduction of public burdens, liferents and interest of debts affecting the estate as at the first term of Whitsunday after the death of the proprietor making the expenditure; and while such expenditure by one or more heirs remains a subsisting charge, no more money shall be laid out under the Act by any subsequent heir in possession (*b*). 2d, Notice to be given three months at least before the improvements are begun, to the heir of entail entitled to succeed after the heirs of the body of such proprietor, specifying the kind of improvements, and on what farms or parts of the estate it is intended to execute them, and a copy lodged with the Sheriff-clerk. 3d, An account of the expenditure for the prior year, subscribed by the proprietor, shall, with the vouchers, be annually during the work, lodged with the Sheriff-clerk four months after Martinmas, who shall record such notices, accounts and vouchers within one month after being so lodged (*c*). 4th, The statutory claim shall be exigible one year after the death of the improver, with interest from the term at which the succeeding heir's right to the rents commenced; and if not paid within three months after a requisition to that effect, the executor or assignee may obtain decree, and execute all other diligence except adjudication of the fee of the estate, and he shall be preferable to the other creditors of the heir in possession. But the heir shall be discharged on assigning one-third of the clear rents; and the heirs and successors of an heir of entail in any other than the entailed estate shall be discharged on paying one-third of the rents

of the entailed estate which have come to his or their use (*d*). 5th, Where the next succeeding heir shall die before the money is paid, the party in right may sue either his general representatives, or the heir of entail succeeding after him, or both; and use the like diligence as respects the entailed estate, and have the same preference as is before mentioned; and he may in like manner, and with the same preference, sue every succeeding heir in possession (*e*).

3. *Relief competent to heirs, &c.* The first succeeding heir and his heirs and executors shall, to the extent of one-third of the rents which have come to their use, relieve all subsequent heirs of entail of the amount paid by them, and the next succeeding heir and his representatives shall relieve all subsequent heirs to the extent of one-third of the rents which have come to their use, and so on; and relief shall be competent to the executors or assignees of each of such first succeeding heir and subsequent heirs, who pays more than is repaid by the third part of the rents which have come to his use, or the use of his executors (*f*).

4. *Limitation of action and claim.*—(1.) The claimant shall require payment from the succeeding heir, within two years from the period of the improver's death, and if payment is not made, shall, within six months after that period, bring his action in the Court of Session, and take decree and do exact diligence, without delay, to the extent at least of one-third part of the rents of the estate which shall have become due to such heir, under the penalty of losing all claim against the future heirs to the extent of such third part (*g*). (2.) The decree is declared to be no ground of adjudication against the fee of the estate (*h*). (3.) And the claim is absolutely extinguished when it vests in the heir in possession (*i*). (4.) The expenses of the process are in the discretion of the Court, unless the full sum claimed is awarded, when it carries costs (*k*).

5. *Declarator by Improver.*—Action is made com-

petent by declarator before the Court of Session, or process before the Sheriff, at the instance of the proprietor making the improvements, against the heir of entail next after the heirs of his own body, for having the sum fixed and declared; the decree in which shall be final if in the Sheriff Court, provided it has not been brought under review of the Supreme Court by suspension, within six months after being pronounced, or if in the Court of Session, either in a declarator or suspension, provided it has not been appealed within twelve months (*l*).

5. *Improvements on Mansion-house.*—(1.) A proprietor of entail building, or repairing or adding to a mansion-house or offices, shall be a creditor of the next succeeding heir for three-fourth parts of his expenditure (*m*). (2.) But under the *provisos*, 1st, That the claim shall be limited to two years' rent, after deduction of public burdens, life-rents and interests of debts which shall affect the estate as at the first term of Whitsunday after the death of the heir who expended the money claimed; 2d, That notice shall be given, and the notice, accounts and vouchers recorded as above (*n*). (3.) The party in right may demand payment from the next succeeding heir, with interest from the term when his right to the rents commenced, after a year from the period of the improver's death; and if the money is not paid within three months, action shall lie as in the case of ordinary improvements (*o*). (4.) And the same rules as to relief, preference, evidence and expenses, shall prevail as in that case (*p*).

(*a*) 10 Geo. III. c. 51, § 9.
(*b*) The Act, § 10, 13.
(*c*) The Act, § 12, 14.
(*d*) The Act, § 15, 16, 19.
(*e*) The Act, § 17.
(*f*) The Act, § 18, 22.
(*g*) The Act, § 20, 21.
(*h*) The Act, § 23.
(*i*) The Act, § 24.
(*k*) The Act, § 25.
(*l*) The Act, § 26.

(*m*) The Act, § 27.
(*n*) The Act, § 28, 29.
(*o*) The Act, § 30.
(*p*) The Act, § 31.

35. APPLICATION OF THE STATUTE. (1.) The Montgomery Act is declared to be inapplicable to entails made on or after the 1st of August 1848 (*a*). (2.) The Act has been held to apply only to lands included in deeds of entail which have been duly recorded in the register of tailzies (*b*). (3.) The improvements must be such in effect, and not merely of the nature of repairs executed for the purpose of maintaining a subject, and leaving it at his death in equally good condition as at the heir's succession (*c*). (4.) A family monument on a large estate is within the statute (*d*). (5.) Private roads may be deemed improvements under the statute (*e*).

(*a*) 11 and 12 Vict. c. 36, § 12.
(*b*) Paget, 24th Feb. 1837, 15 S. 667; Lord Macdonald, 26th May 1840, N. S. 2, 889.
(*c*) Fraser, 16th Dec. 1841, 4 N. S. 266.
(*d*) Fraser, 27th Feb. 1840, 2 N. S. 684.
(*e*) 11 and 12 Vict. c. 36, § 20.

36. INTERPRETATION OF THE STATUTE.—1. *Notice.* (1.) The notice required to be given to the heir of entail entitled to succeed after the heirs of the body of the improving proprietor, must be accurate, and given three months before the improvements are begun (*a*). Thus intimation to the wrong party, although *bona fide* thought to be the heir entitled to notice, and only found not to be so by a decision on a nice point of law, was rejected (*b*). But a notice that the proprietor in possession intended for their improvement, to enclose, plant and drain certain lands was held sufficient (*c*). A notice duly made, under which improvements proceed uninterruptedly, although for a series of years, need not be renewed; nor does a notice fall by the death of the party to whom it was given, if the improvements notwithstanding an interval of about two

years have not been abandoned; but the notice must be timeously followed up, and thus a notice given several years prior to the execution of the improvements was held to have expired (*d*). (2.) A copy of the notice must be lodged with the Sheriff-clerk, to be recorded, and as for this no time is specified, it may be done when the first production of accounts and vouchers takes place.

2. *Accounts.* (1.) The account lodged with the Sheriff-clerk must state the particulars, and not merely the amount of the expenditure; (*e*); but it has been held a sufficient specification to give the names of the tradesmen, and the general description of the work, such as mason work or wright work (*f*). (2.) The account must be subscribed prior to its registration, (*g*), by the party or his factor or commissioner, but the subscription of his law-agent is insufficient (*h*). (3.) The account must be recorded strictly within the statutory period, and a delay of a week was held fatal to the claim (*i*). (4.) It must be lodged at the statutory period, annually, during the progress of the improvements, and not merely after their completion, or when the expense comes to be actually paid (*k*). An extract of the account from the Sheriff-Court books is insufficient evidence in an action in the Court of Session, and a proving of the tenor is necessary (*l*).

3. *Vouchers.* (1.) The tradesman's receipts are the proper evidence of the amount expended, and those of intermediate persons, such as tenants employed or authorised to conduct the operations, have been rejected (*m*). But an affidavit by the workman employed to superintend the manufacture and application of materials, such as wood belonging to the improver, and used in the work, was sustained as the proper evidence of the quantity and value of the wood (*n*). (2.) The vouchers in like manner as the accounts, must be strictly recorded within the statutory period (*o*).

4. *Judicial Procedure.* (1.) The action competent to the improver is a proper action of declarator for ascer-

taining the amount due, and it is incompetent, under the statute, to award the expenses of this proceeding, as being for his own advantage (*p*). On the other hand, the costs of an action for payment at the instance of the representatives of the improving heir, are, by the statute, laid on the defender, if found liable in the whole amount demanded; and if decree is not obtained for the full sum, the costs are in the discretion of the Court (*q*). (2.) It is also incompetent, unless on the ground of falsehood or fraud, to open up a decree of declarator in absence after the statutory limitation (*r*).

5. *Mansion House.* (1.) In a case where there was already a mansion-house on one of several estates possessed under the same entail, it was held that the erection of a mansion-house on another of the estates which lay at a great distance from the former, was competent, and that the outlay was to be calculated upon the rental of the whole estates (*s*). (2.) Under the repairs of the mansion-house and offices, are included necessary fixtures, the introduction of water into the mansion-house, the erection of a milk-house and ice-house, and the building and repairing of garden walls (*t*).

6. *Preference.*—There is no room for preferring an assignee to a claim for improvements made after the statutory amount had been already constituted a proper debt against the succeeding heir, (by which means the powers of the heir in possession are exhausted,) to the assignee to a claim for the expense of the improvements first executed, and so constituted a debt (*u*).

(*a*) Elliot, 22d Jan. 1793, M. 15,622.

(*b*) Finlayson, 12th Dec. 1821, F. C. 1 S. 196; Thomson, 11th Dec. 1824, 3 S. 272; Sandford on Entails, pp. 338-9.

(*c*) Campbell, 15th May 1822, F. C. 1 S. 383; Elliot as in (*a*).

(*d*) Fraser, 2d Dec. 1835, 14 S. 89; Williamson, 18th Feb. 1841, 3 N. S. 570; Torrance as in (*e*).

(*e*) Torrance, 1st Dec. 1820, F. C., as reversed, 26th May 1826, 2 W. S. 429.

(*f*) E. of Kintore's Exec., 30th June 1847, 9 N. S. 1394.

(*g*) Campbell, as in (*c*).

(*h*) Fraser, 2d Dec. 1835, 14 S. 89; Fraser, 27th Feb. 1840, 2 N. S. 684.
(*i*) Campbell as in (*c*).
(*k*) Marq. of Abercorn, 11th July 1840, 2 N. S. 1382.
(*l*) Fraser, 17th Feb. 1840, 2 N. S. 684.
(*m*) Stirling, 14th Dec. 1814, F. C.; Torrance as in (*e*); Wiliamson, 18th Feb. 1841, 3 N. S. 570.
(*n*) Fraser as in (*l*).
(*o*) Campbell as in (*g*).
(*p*) Torrance as in (*e*).
(*q*) 10 Geo. III. c. 51, § 25.
(*r*) Lord Macdonald, 7th Feb. 1831, 9 S. 460; Lindsay, 30th May 1834, 12 S. 657; Macpherson, 14th May 1839, 1 N. S. 718.
(*s*) Stirling as in (*m*); Macdonald, 15th Dec. 1835, 14 S. 150.
(*t*) Fraser as in (*d*); E. of Kintore's Exec. as in (*f*).
(*u*) Cochrane, 30th June 1836, 14 S. 1040.

37. THE RUTHERFURD ACT.—1. *Expense of past improvements.* (1.) The Act of 1848 has abolished the complicated method introduced by the Montgomery Act, of laying a proportion of the expense of improvements executed under entails dated prior to 1st August 1848, on the future heirs, by means of the obligations of the latter for three-fourths of the amount sanctioned by the statute being made operative by direct claims and clauses of relief of a mere personal nature. (2.) In place of it has been substituted in the case of improvements executed prior to the passing of the late Act, an annual-rent charge to be granted under the authority of the Court against the rents of the estate, not exceeding legal interest on *three-fourth* parts of the amount expended and ascertained by decree under the Montgomery Act, payable during the life of the improver, and of a sum not exceeding the rate of £7, 2s. *per cent.* on such three-fourth parts, and so in proportion for any greater or less sum, payable for twenty-five years after his death (*a*). (3.) Reference is made to the Appendix for the form in which it is thought that the bond of annual-rent ought to be framed. It contains, 1st, A personal obligation on the heir in possession for an annual-rent, at the rate of legal interest, on three-fourth parts of the ascertained expenditure, payable during the life of the

granter; 2dly, A warrant for infeftment in an annual-rent (and in the lands themselves in security) at the above rate, payable during the same period; 3dly, A personal obligation on the granter and the heirs of entail succeeding to him for an annual-rent, calculated on the same amount, at the rate of L.7, 2s. for every L.100, payable for twenty-five years after the death of the granter; and, lastly, a warrant for infeftment in an annual-rent at a like rate, and in the lands themselves in security. The bond of annual-rent thus follows in some respects the form of the heritable bond without the dispositive clause, and the security will be completed by an instrument of sasine duly recorded. (4.) It is to be noted that no rules are laid down or rates fixed for the redemption of an annual-rent right by a future heir, which can therefore only be effected by voluntary arrangement. (5.) Nor is it provided that the *consideration* of granting a bond of annual-rent shall not exceed the sum on which the annual-rent is calculated, although this is implied, and the acceptance of any higher consideration would plainly be a fraud against the future heirs.

2. *Expense of future Improvements.*—(1.) The like optional powers are given to an heir in possession under an entail dated before the 1st August 1848, who has executed improvements subsequent to the passing of the Act, (14th August 1848,) and obtained decree for three-fourth parts of the sums expended thereon under the Montgomery Act, to grant an annual-rent charge in the same form as in regard to past improvements, limited, however, to twenty-five years from the date of the decree of declarator, or during such portion of that period as shall remain at the date of the bond; such annual-rent not exceeding the sum of £7, 2s. for every £100 of the *whole* of the sums expended, and so in proportion for any greater or less sum (*b*). (2.) The bond of annual-rent applicable to this and the following cases, may be framed from the example in the Appendix.

3. *Rights of Executor, &c.*—(1.) In the event of the heir in possession having died, after obtaining decree of declarator for three-fourth parts of the expense of improvements executed before the passing of the Act, without having executed a bond of annual-rent, or charged the estate as after-mentioned, his executor or personal representative or assignee may, under the authority of the Court, require the heir in possession to execute a bond of annual-rent for a sum not exceeding £7, 2s. for every £100 of such three-fourth parts, payable for the period of twenty-five years after the death of the improver; reserving to the heir a right to impute, in part payment, any excess of sums paid by or recovered from him towards such improvement debt, beyond the amount of annual-rents due after the death of the improver (*c*). (2.) It is to be noted, 1st, That the succeeding heir cannot require the executor to accept of a bond of annual-rent; and, 2d, That the power to demand a bond of annual-rent is given only to the executor or assignee of the heir making the expenditure.

4. *Expenditure not in terms of the Statute.*—(1.) Where an heir in possession shall have at any time, whether prior or subsequent to the passing of the Act, (14th August 1848,) executed improvements of the nature of the statutory improvements, but shall not have obtained decree under the Montgomery Act, by reason of its provisions not having been adopted or not duly complied with, such heir may apply for the authority of the Court to grant bond of annual-rent for the statutory amount, and the Court, after such proceedings as they may think fit to direct or to adopt, shall consider the application, and take such evidence and institute such inquiry as may seem necessary; and if it shall appear that the improvements are of the nature contemplated by the Montgomery Act, and that the expenditure was *bona fide* made, they shall grant warrant for the execution of a bond of annual-rent, as in the case of improvements for which decree has been

obtained (*d*). (2.) Thus the annual-rent will not exceed £7, 2s. on every £100 of three-fourths of the amount expended, in the case of past improvements, and in that of future improvements, £7, 2s. on every £100 of the whole amount expended. (3.) No power is given to the representatives of the heir to follow out the process after his death, and the benefit of the enactment being therefore personal to the improver, will be absolutely lost in that event.

5. *Remedies.*—(1.) Annual-rents shall be recoverable out of the rents and profits of the estate, and from the heir in possession, as accords of law, but shall not be made the ground of adjudication or eviction of the fee. (2.) The heirs in possession, in their order, shall be bound to keep down such annual-rents, and no more than two years' arrears, with interest and penalties, shall be recoverable out of the rents, as respects future heirs; all remedies, however, being reserved, as for a personal debt, against the heir in possession (*e*).

6. *Bond and Disposition in Security, optional.*—(1.) It is provided that in all cases in which the proprietor in possession may grant, or may be called upon to grant, a bond of annual-rent in terms of the Act, he may, under the authority of the Court, charge the fee and rents of the estate or any part of the estate except the mansion-house and its offices and policies, with two-third parts of the sum on which the amount of the bond of annual-rent, if granted, would be calculated; that is to say, with two-thirds of three-fourth parts of the expenditure for which decree may have been obtained, in the case of improvements executed before the 14th August 1848, and of two-thirds of the whole sums expended and decerned for subsequent to that date. (2.) It is not provided that the proportion shall be diminished according to the interval between the death of the improver or the date of the decree, and the date of the bond. (3.) The bond may be in the like form, and shall have the like effect and operation, and be subject to

the like conditions and provisions as to keeping down interest, and as to the remedies against the estate and its rents, and otherwise, as are provided by a future clause in regard to bonds and dispositions in security for provisions to younger children granted under the Aberdeen Act (*f*).

7. *Effect of Bond.*—The granting of any bond of annual-rent or bond and disposition in security, shall operate as a discharge of all claims except those constituted by the bond (*g*).

8. *Title of the Heir in possession.*—It is nowhere in the Montgomery Act or the Rutherfurd Act, said, that the heir of entail in possession shall be infeft in the estate, but, on the contrary, by the latter, he may without being infeft and although the entail is unregistered, perform any act permitted to be done (*h*); but there is no alteration or suspension of the ordinary rule of law which excludes the debts of an heir uninfeft from affecting the lands, and consequently, the bonds of annual-rent or bonds and dispositions in security to be granted for the expense of improvements, will not found a direct claim or charge against the rents of the estate for any longer period than the lifetime of the granter, and that only as personal claims, unless granted by a feudal proprietor, or validated by his subsequent infeftment.

(*a*) 11 and 12 Vict. c. 36, § 13.
(*b*) The Act, § 14.
(*c*) The Act, § 15.
(*d*) The Act, § 16.
(*e*) The Act, § 17.
(*f*) The Act, § 18.
(*g*) The Act, § 19.
(*h*) The Act, § 42.

38. STATUTORY POWERS AS TO EXCAMBION.—1. *The Montgomery Act.* (1.) By the 10 Geo. III. c. 51 (*a*), certain limited powers are given to heirs of entail on

the preamble, that the enclosing of lands may be retarded or prevented, or at least rendered inconvenient, by the want of power to exchange small parcels of the lands of their entailed estates for other lands convenient for the estate, and more conducive to the general improvement of the country. (2.) Transactions were sanctioned, to the extent of thirty acres of arable land, lying in one place or plot, or a hundred acres of lands consisting of hills or other grounds incapable or improper by their nature, for culture by the plough; but the restriction as to quantity was, in practice, evaded by separate transactions, and these, in one instance, were sustained (*b*). (3.) The value is directed to be ascertained by the Sheriff, on the application of the proprietor of the entailed estate, and the contract of excambion, executed under his authority, shall be recorded in the Sheriff-court books within three months after its execution, meaning the last date of the deed. (4.) The contract is declared to be effectual to all intents and purposes, and the land given in exchange to the entailed estate shall be held to be a part thereof, and subject to all the prohibitory, irritant and resolutive clauses of the entail, in the same manner as if it had been originally a part of the estate; and the lands given from the entailed estate shall be held as out of the entail, and liberated from all its prohibitory, irritant and resolutive clauses. Neither in this nor the Rosebery Act is any form given for the contract of excambion, which makes it expedient to insert in it the restraining clauses of the entail. (5.) The Act was declared to apply to all tailzies whether made before or after the statute of 1685 (*c*); but it is now inapplicable to those dated on or after 1st August 1848 (*d*).

2. *The Rosebery Act.*—(1.) By the statute of William the IVth, the effect of the Montgomery Act is saved, but the powers of heirs of entail as to excambion are enlarged, and certain forms prescribed for carrying through the transaction in the Court of Session. As those forms are however superseded by the late statute, although

not abrogated, and the more simple and effective procedure which it contains introduced in their place, it is unnecessary here to mention them in detail (*e*). (2.) By the Rosebery Act, the heir in possession under an entail duly made and established, and therefore recorded in the Register of Tailzies, having completed a feudal title, may make excambion of any portion of the entailed estate not exceeding one fourth of its value, excepting the principal mansion house or offices, or the garden, park, lawn, house-farm or policy, for an equivalent in other lands or heritable property; the power of any one heir when exercised to that extent being exhausted (*f*). (3.) The contracts of excambion shall be effectual to all intents and purposes, and the lands and heritages received in excambion held to be a part of the entailed estate, and subject to all the prohibitory, irritant and resolutive clauses of the entail, in the same manner as if they had been originally a part of the estate; and the lands and heritages given in exchange shall be held as out of the entail, and liberated from all its prohibitory, irritant and resolutive clauses. When the subjects proposed to be given in exchange are held under more than one deed but descendible to the same series of heirs, they shall be dealt with as forming part of the same estate and contained in one and the same entail (*g*). (4.) The contract was directed to be recorded both in the Sheriff-Court books and the Register of Entails, a provision which is repealed by the late Act as respects registration in the former (*h*).

(*a*) 10 Geo. III. c. 51, § 32, 33, 34.
(*b*) M'Kechnie, 11th July 1821, 1 S. 114. See Marq. of Abercorn, 26th Jan. 1816, F. C.
(*c*) The Act as in (*a*), § 1.
(*d*) 11 and 12 Vict. c. 36, § 12.
(*e*) The Act as in (*d*), § 37.
(*f*) 6 and 7 Will. IV. c. 42, § 3, 4.
(*g*) The Act as in (*f*), § 5, 6.
(*h*) The Act as in (*d*), § 37.

39. AMENDMENTS OF THE ROSEBERY ACT.—(1.) By an Act of the 1st and 2d of the Queen, the powers of making excambions contained in the Rosebery Act are extended to heirs of entail under deeds of entail not recorded in terms of the Act of 1685 (*a*). (2.) The Act dispenses with registration in the Register of Tailzies of any contract of excambion executed under the powers of the Act, until the registration of the entail itself, when it is to be recorded at the same time as the entail. (3.) Owing to a doubt which had occurred in regard to the effect of contracts of excambion under the Act of Will. IV., which did not contain the destination and restraining clauses of the entail, a supplementary Act was passed to remove any doubts on the subject (*b*). By this Act a reference to those clauses is made sufficient.

(*a*) 1 and 2 Vict. c. 70, in App.
(*b*) 4 and 5 Vict. c. 24, in App.

40. INTERPRETATION.—The cases which have occurred under the *Montgomery* and *Rosebery* Acts are few and unimportant, (*a*). The Court, in one instance, authorised an extra value to be put on the fee-simple lands proposed to be acquired in exchange, on the ground of their being, from local situation, worth more to the heirs of entail than to an ordinary purchaser (*b*).

(*a*) See M'Kechnie, 11th July 1821, 1 S. 114; Hamilton, 13th Nov. 1833, 12 S. 22; E. of Kinnoul, 16th July 1840, 2 N. S. 1458. Here a patronage was held a fit subject for excambion.
(*b*) Lord Macdonald, 5th July 1838, 16 S. 1259.

41. THE RUTHERFURD ACT AS TO EXCAMBION.—(1.) It is provided as to excambions, that heirs of entail in possession under entails made prior to the statute, may excamb the estate in whole or in part, with the consent of the whole heirs of entail, if there be less than three, at the date of the consents, and at the date of presenting

an application under the Act for the authority of the Court; or otherwise, with the consent of the three nearest heirs who at the time are entitled in their order to succeed to the heir in possession; or otherwise, with the consent of the heir-apparent under the entail, or of the heir or heirs, in number not less than two including the heir-apparent, who, in order successively, would be heir-apparent. The contract of excambion and other necessary deeds are required to be executed at sight of the Court (*a*). It is to be noted, that although the parties to give consent are the same as are required in sales and for disentailing the estate, it is not necessary that the heir next in succession shall be a person of twenty-five years of age, not subject to any legal incapacity. Consequently, consent may be given by one of full age, or, in terms of another clause, by the guardians of a pupil or minor or incapable person (*b*). (2.) The contract being a deed of constitution as respects the lands received in exchange, must contain the destination, and the conditions, provisions and prohibitory, irritant and resolutive clauses of the original entail, and it will thus be a more complex deed than a contract under the Rosebery Act as amended. No rules are laid down for fixing the relative values of the lands to be exchanged, but these will be ascertained under the authority of the Court; and care must be taken in framing the deed, to conform to the stamp laws by setting forth the true money consideration, if any, which is given by the heir of entail to the other party for the exchange, over and above the lands conveyed by him. (3.) An heir of entail, without the consents required by the statute for a sale, cannot excamb the estate or part of the estate for lands of less value, and a money price as part of the consideration, thus effecting a sale under cover of a transaction of another kind. (4.) It is not in words made necessary to record the contract in the Register of Tailzies, or any other register; but registration in the former is necessarily implied, because essential to the establish-

ment of the contract as an entail of the acquired lands under the statute of 1685. (5.) The clause differs as to powers, from that which authorises disentail, there being no authority committed to the only heir of entail in existence for the time, and unmarried, to make excambion, although he may disentail the estate in whole or in part. (6.) The forms of procedure as to excambions introduced by the Rosebery Act are superseded, and the use of those sanctioned by the Rutherfurd Act authorised in their place. But, in substance, the Rosebery Act is still in force (*c*).

(*a*) 11 and 12 Vict. c. 36, § 5.
(*b*) The Act, § 31.
(*c*) The Act, § 37.

42. FAMILY PROVISIONS.—The powers conferred on heirs of entail in reference to provisions for husbands, wives and children, are contained in the Aberdeen Act (*a*), and the Rutherfurd Act (*b*).

(*a*) 5 Geo. IV. c. 87.
(*b*) 11 and 12 Vict. c. 36.

43. THE ABERDEEN ACT.—1. *Wives.* (1.) The preamble of this statute proceeds on a recital of the Acts of 1685 and of the 10th of George III., and a statement that sundry entails contain no powers in regard to the granting of provisions to the wives or husbands, and the children of the proprietors of the estates, and in many other entails by reason of the change in the value of money, the improved value of land and other causes, the powers of granting such provisions had become entirely inadequate. (2.) Power is therefore given to every heir in possession, under certain limitations, to infeft his wife in a liferent provision by way of annuity, not exceeding a third of the free yearly rent when the lands are let, or of the value when they are not let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, (including the interest of provisions to children authorised by a future clause), and the yearly

amount of all other burdens affecting and burdening the lands or their rents or proceeds, and diminishing their clear yearly rent or value to the heir in possession; all as the same may happen to be at the death of the granter. The *institute* in the entail is not in words empowered by the Act (*a*). (3.) An excess over the statutory limit does not void the provision, which is subject to restriction (*b*). (4). In estimating the amount of rental on which the provision will be calculated, the interest of the amount provided to younger children under a future section must be deducted from the free rent, as, on the other hand, will be done with the annuity, in estimating the amount of rental for children's provisions. The operation is performed in practice according to a *formula* which will be found appended to the report of a case respecting provisions under the conventional power in a deed of entail (*c*).

2. *Husbands.*—The annuity to a husband is fixed at one-half the free rents estimated as above, or one-third, in the event of a prior annuity to a wife or husband affecting the estate under the Act; and is subject to the same rules as in the case of a wife (*d*).

3. *Restriction as to number.*—When two liferents subsist, it shall not be competent to grant a third, so as to take effect until one of the former has expired; but the power may be exercised, so as to have the effect of increasing a former or granting a new liferent, upon the ceasing or expiration of any former or subsisting liferent, although such may not take place in the lifetime of the granter (*e*).

4. *Children.*—(1.) Bonds of provisions or obligations to the child or children who shall be alive at the death of the granter, or of whom his wife shall then be pregnant, and who shall not succeed to the estate, may be granted, binding the succeeding heirs of entail, and bearing interest from the granter's death. (2.) The amount of the fund out of which provisions may be granted, after making the deductions before-mentioned including existing provisions

to wives and children, shall be, for one child, one year's, for two children, two years', and for three or more children, three years' free rent or value (*f*). (3.) But his share of the provision may be secured in the marriage-contract of a child, so as to be effectual notwithstanding his predeceasing the granter (*g*). (4.) Upon any child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished (*h*). (5.) Where the statutory powers have been fully exercised by one or more heirs in possession, they shall cease until part of the provisions so granted shall have been paid or extinguished; the heir in possession being only empowered to grant provisions to such an extent as may be open and unexercised for the time. In this particular, therefore, there is a marked distinction between provisions to husbands or wives, and provisions to children, the former being permitted prospectively, whereas the faculty as to the latter, and not merely the effect of the provision, is absolutely suspended until some part of the provisions existing to the full extent of the power has been extinguished (*i*). (6.) An excess over the statutory limit does not void the provision, which is only subject to restriction (*k*).

5. *Preference and effect.*—(1.) Annuities and provisions shall not affect the fee, but only the yearly rents and proceeds of the estate (*l*). (2.) Provisions to children shall be exigible from the succeeding heir, after a year from the granter's death, with interest from the period when the succeeding heir had right to the rents, and all diligence is made competent, except adjudication against *the entailed estate;* words which do not exclude adjudication of the heir's liferent (*m*). (3.) An heir in possession sued for payment of children's provisions shall be discharged on assigning one-third of the clear rents or proceeds of the estate (*n*).

6. *General enactments.*—(1.) An irritancy is not incurred by exercising the statutory powers, and the con-

ventional powers of the entail are saved; but where these are less than the statutory powers, the latter cannot be exercised in addition to the former so as to exceed in whole the statutory proportions of the rents (*o*). (2.) The powers of the Act, and of the *Montgomery Act*, are not to be exercised to such an extent as to deprive the heir in possession of more than *two-thirds* of the free rents (*p*).

7. *Title of the heir in possession.* (1.) It is deducible from the words "provide and infeft" used in § 1 and 2 in reference to the power to provide wives and husbands, that the granter of the annuity shall have completed a feudal title under the entail, at least during his own lifetime, as otherwise his warrant for infeftment would be inept. (2.) In reference to provisions to children, although the power is given in general terms to the *heir in possession*, the feudal rule equally applies, so that, if an heir apparent granting obligations whether heritable or personal, should die without being infeft and before he has been three years in possession, they will not be effectual against future heirs. (3.) But when he holds a mere personal right under an entail not feudalized, or when the entail although feudalized, has not been recorded in the Register of Tailzies, it is thought that the Act as contemplating a tailzie completed and recorded in manner directed by the Act of 1685, is inapplicable to the case.

8. *Application and Interpretation of the Act.*—(1.) By the Act of 1848, the Aberdeen Act is declared to be inapplicable to entails made on or after 1st August 1848 (*q*). (2.) But few cases have occurred affecting the terms of the Act, and reference is made to provisions under a power in the entail. (3.) The rent of the year current at the death of the granter is the rule under the statute, without deduction of income-tax (*r*). (4.) The obligation must be directly imposed, *e. g.*, the statutory provision cannot be given by means of a bond obliging the heirs of entail to relieve the general representatives of the granter of a provision affecting them; but the existence of such a pro-

vision is no bar to the exercise of the statutory powers (*s*). (5.) The nomination of a trustee under the provision of the Act by which the heir in possession may discharge his obligation by assigning a third of the rents, may be competently made by the Lord Ordinary under a remit by the Court (*t*).

9. *Form of the Bond.*—(1.) It is a good practical rule to grant provisions to children under the statute, by bonds of annualrent obliging the granter and the heirs of entail personally, and also directly affecting the rents of the estate, to which, if there be no express authority for it in the Act, there seems at least no obstacle. By using this form, all questions of preference between the children and the creditors of future heirs holding infeftments in security, are avoided. For as the Act declares that the provisions shall form a burden only on the rents and the succeeding heirs, they are not in the position of entailer's debts, as are provisions granted under powers in the deed not restricted to the rents, which, as will be seen under the head of *Reservations*, have been held to ground adjudication both as to principal and interest. (2.) In competition therefore with the creditors of future heirs in common debts, although provisions under conventional powers are unquestionably preferable as respects the estate, and being recoverable by adjudication and ranking and sale, are necessarily prior in ultimate effect to all burdens which merely attach to the rents, the doubt has occurred whether provisions under the statute, if constituted by personal obligation, are not postponed to securities duly imposed by the heir in possession, during his lifetime, by reason of the limited nature of the obligation and burden which they create on the estate. Bonds therefore for the statutory provisions ought to be in the form of proper bonds of annualrent, affecting the rents of the estate, and binding the heirs personally, being redeemable of course by the heir in possession on payment of the principal sum and arrears of interest.

(*a*) 5 Geo. IV. c. 87, § 1, 3.
(*b*) The Act, § 7.
(*c*) See Macdonald Lockhart, 18th May 1836, 14 D. B. M. 785.
(*d*) The Act as in (*a*), § 2.
(*e*) The Act, § 3.
(*f*) The Act, § 4.
(*g*) The Act, § 5.
(*h*) The Act, § 4.
(*i*) The Act, § 6.
(*k*) The Act, § 7.
(*l*) The Act, § 8.
(*m*) The Act, § 9.
(*n*) The Act, § 10.
(*o*) The Act, § 11, 12.
(*p*) The Act, § 13.
(*q*) 11 and 12 Vict. c. 36, § 12.
(*r*) Campbell, 21st May 1831, 9 S. 624; Maclaine, 29th Dec. 1845, 8 N. S. 150.
(*s*) Braedalbane, Trs. 26th May 1840, 2 N. S. 904.
(*t*) Maxwell, 26th June 1840, 2 N. S. 225.

44. THE RUTHERFURD ACT AS TO FAMILY PROVISIONS. —1. *Partial Repeal of the Aberdeen Act.*—It is enacted that the Act of the 5th of Geo. IV. c. 87, shall be inapplicable to any tailzie executed on or after 1st August 1848 (*a*).

2. *Estate made liable for Children's provisions.*—(1.) An heir of entail in possession liable to pay or provide by assignation of the rents for provisions to younger children, granted by a former heir under the Aberdeen Act, or under powers in the entail, or who, in the marriage-contract of his own younger child, shall under the Act or the entail have granted a provision out of the rents, may charge the fee and rents of the estate, exclusive of the mansion-house and its offices and policies, by bond and disposition in security, binding the granter and the heirs of entail in their order, for the amount of such provisions, and containing all clauses usual in bonds and dispositions in security granted over fee-simple lands (*b*). A power of sale may therefore be introduced into such bonds. (2.) The authority of the Court is in the first instance to be obtained,

and the petition shall, in a schedule, set forth the specific portion of the estate which it is proposed to charge with the provisions (*c*). (3.) The heir in possession for the time shall be bound to keep down the interest accruing during his possession, and the creditors' remedy as against the fee and rents of the estate in the hands of a succeeding heir, shall be limited to the principal sum, with two years' interest (*d*). (4.) Portions of the estate may be sold under the authority of the Court, for paying off provisions so charged on the estate, the price to be duly applied, and dispositions in fee-simple granted at sight of the Court, and the surplus, if exceeding £200, re-invested in other lands to be added to the estate, or laid out in payment of entailer's debts, or of any other money charged on the fee under this or any other Act, or in the redemption of the land-tax, or in permanently improving the estate, or in repayment of money already expended in improvements, as may be deemed most advisable (*e*). The surplus, if less than £200, is directed to be paid to the heir for his own use. (5.) These enactments apply to *future* as well as *existing* entails, in as far as regards provisions granted under a power in the deed.

3. *Provisions out of Trust-money.*—When money or other property, real or personal, has, prior to the 1st August 1848, been invested in trust for the purchase of land to be entailed, or when land has, prior to that date, been directed to be entailed but the direction has not been carried into effect, such money or land may be affected with provisions to husbands, wives and younger children, in terms of, and as if subject to the Aberdeen Act (*f*).

(*a*) 11 and 12 Vict. c. 36, § 12.
(*b*) The Act, § 21.
(*c*) The Act, § 23.
(*d*) The Act, § 22.
(*e*) The Act, § 25.
(*f*) The Act, § 29.

45. STATUTORY POWERS AS TO SALES.—1. *Superiorities.*

Heirs of entail are authorised to sell the superiorities to their vassals; the price to be re-invested in lands subject to the fetters of the entail (*a*).

2. *Redemption of the Land Tax.*—The sale of part of the estate, (or borrowing money thereon), for this purpose, is authorised by the Act 42 Geo. III. c. 46 (*b*).

3. *Lands for Government purposes.*—The Crown is empowered to purchase lands for erecting buildings or making settlements notwithstanding the strictest entail, and to transact with the guardians of minor or fatuous heirs. The price is subject to re-investment (*c*).

4. *Lands for public purposes.*—Prison boards, public companies, and others, are by particular statutes empowered to take or acquire lands from heirs of entail, notwithstanding the fetters of the entail. The price is subject to re-investment, except where of small amount, and it is generally declared to belong to the heir in possession when not exceeding £200 sterling.

5. *Payment of Entailer's debts.* (1.) By the Rosebery Act powers are given to heirs of entail under authority of the Court, to sell portions of the estate for the payment of those debts or obligations of the maker of the entail for which the estate is liable to be adjudged or evicted. The guardians of minors may act for them (*d*.) (2.) The Court shall and may enquire into and fix the amount of such debts and obligations, and direct advertisement of the sale, and the adjustment of articles of roup (*e*). The lands shall be sold and the price divided according to the forms in judicial sales before the Court. They shall belong to the purchaser freed from the fetters of the entail, and the price, when payment cannot be instantly made, is to be consigned in the Bank of Scotland, the Royal Bank of Scotland, the Bank of the British Linen Company, the Commercial Bank of Scotland, or National Bank of Scotland (*f*). Discharges are to be granted by the creditors, which shall be registered in the Books of Council and Session (*g*). (3.) The sur-

plus of the price over £200 shall be invested in lands to be re-entailed on the same heirs, and subject to the like fetters as in the original entail; the deed shall be prepared at sight of the Court and recorded in the Register of Tailzies, and sasine passed upon it. Any lesser surplus is to belong to the heir in possession (*h*). (4.) Notice of all applications to the Court shall, three months prior to the application being made, be published once in the Edinburgh and London Gazettes, and in two or more newspapers published in Edinburgh, and usually circulated in the district where the entailed estate lies, and in one newspaper published in the district; and the Court shall direct such further intimation as may seem proper (*i*). (5.) The powers of the Act belong to trustees holding lands in trust with directions to entail them, and to the *institute* equally with the *heirs* of entail (*k*). (6.) The Act, by its terms, does not contemplate a total sale, but a sale of *portions* only of the estate, and therefore when the debts are manifestly larger than its value, some other mode of disposal must be adopted, *e. g.* a private statute or judicial sale (*l*).

6. *Powers under the Rutherfurd Act.*—(1.) The proprietor in possession, being of full age, may sell the estate under the authority of the Court, in whole or in part, with the same consents as would entitle him to execute an instrument of disentail, and that unconditionally, or subject to conditions, restrictions or limitations, according to the tenor of the consents (*m*). This power applies both to existing and future entails, but as to existing entails, it is not extended to the "only heir of entail in existence for the time, and unmarried," who may in order to accomplish the purpose, but as to existing entails only, proceed in the first instance, under the prior section, to disentail the estate in whole or in part. (*See Disentail.*) (2.) He may under the like authority sell any portion of the estate, except the mansion house with its offices and policies, for paying off any debts for

which it is made competent by this Act to charge the estate by means of bonds and dispositions in security; or which may be charged on the estate by any Act of Parliament, but without a power of sale; and any debts validly charged against the fee of the estate. The upset price is to be fixed, the sale carried through, and the price applied under the same authority, in or towards payment or extinction of the debts. Any surplus if exceeding £200, is to be invested in other lands to be added to the remainder of the estate, or expended in payment of entailer's debts, or of any money charged on the fee of the estate under this or any other Act, or in redemption of the land tax, or in permanently improving the estate, or in repayment of money already expended in improvements, as may be deemed most advisable. If the surplus is invested in other lands, the tailzie of these shall, whatever its actual date, be taken to be of the date of the original tailzie of the estate. Any surplus less than £200 shall belong to the heir in possession (*n*). (3.) Debts of the entailer, therefore, when already secured on the estate, or made charges against the fee of the estate by adjudication, come within the clause, although for these the former remedies may still be resorted to, namely, the Rosebery Act, a private statute, or judicial sale. And by a subsequent clause such debts may be paid out of the surplus price of entailed lands, or of any right or interest connected with the entailed estate, sold or disposed of under the Act for other purposes, or out of trust money directed to be entailed on the same heirs (*o*). (4.) No creditor having a power of sale under a bond and disposition in security or other deed of security under this or any other Act, shall sell in manifest excess of what is necessary or proper for payment and extinction of the principal and interest of his debt and expenses, and the decree of the Court in any suspension of a sale on the ground of manifest excess shall be final, and not subject to appeal. The surplus, if exceeding £200, shall be re-entailed, and the deed, whatever its actual date, taken to be of the date

of the original entail, and any surplus not exceeding £200 shall belong to the heir in possession (*p*). (5.) The above provisions apply, according to their nature and terms, to entails both *existing* and *future*.

(*a*) 20 Geo. II. c. 50, § 16, 17.
(*b*) See the statute; Bell's Pr. 1773; Sandford on Entails, 348.
(*c*) The Act as in (*a*); 20 Geo. II. c. 51.
(*d*) 6 and 7 Will. IV. c. 42, § 7; Dalrymple, 17th July 1846, 8 N. S. 1217.
(*e*) The Act as in (*d*), § 8, 9.
(*f*) The Act, § 10, 11, 18.
(*g*) The Act, § 13.
(*h*) The Act, § 15, 16, 17, 19.
(*i*) The Act, § 21.
(*k*) The Act, § 20.
(*l*) The Act, § 7, *et seq.*; Sandford on Entails, 365.
(*m*) 11 and 12 Vict. c. 36, § 4, 6.
(*n*) The Act as in (*m*), § 25.
(*o*) The Act, § 26.
(*p*) The Act, § 30.

46. STATUTORY POWERS OF FEUING.—1. *For Special Purposes.*—(1.) By an Act of the 3d and 4th of the Queen, power is given to heirs of entail in possession on a feudal title, and to the tutors and curators and other legal guardians of pupils, minors, and persons under mental or other legal disability, to grant or dispone in feu portions of land as the sites of places of public Christian worship, schools, burying grounds and play grounds, and for dwelling-houses and gardens for the ministers and masters. (2.) The feu-duty may be below the just avail and value of the ground. (3.) Grassum, fine or other consideration than the feu-duty is excluded. (4.) The extent of ground shall not exceed one-fourth of an acre for a place of worship, one acre for a burying ground, one-eighth of an acre for a dwelling-house, one acre for a school-house and play-ground, or half an acre for a garden. (5.) The Sheriff shall have power to decide, with the consent of the next heir, or without his consent on notice in terms of the Act. (6.) The recording of the feu-charter in the Register of Sasines is made

equivalent to infeftment. (7.) Alienation is excluded, and all conveyances, sub-feus, leases, securities and adjudications are declared void. (8.) The land shall be used solely for the purpose for which it is acquired (*a*).

2. *The Rutherfurd Act.*—(1.) This Act authorises the proprietor in possession, being of full age, to feu the estate in whole or in part, under the authority of the Court, with such and the like consents as would enable him to execute an instrument of disentail, subject also to the provision as to disclosing entailer's debts, &c.; and that unconditionally, or subject to conditions, restrictions and limitations, according to the tenor of the consents (*b*). (2.) This power applies to entails both *existing* and *future*, but is not extended in reference to existing entails to "the only heir of entail in existence for the time, and unmarried," who may, however, under a prior clause, but as respects existing entails only, obtain his object by disentailing the estate in whole or in part (*c*). (3.) By a subsequent clause it is made lawful for the proprietor in possession under an *existing* entail only, notwithstanding the prohibitions, and irritant and resolutive clauses of the entail, or of any maximum or minimum of the extent of ground, to grant feus or long leases under the authority and with the approbation of the Court, of any part of the estate, excepting the mansion-house with its offices and policies, for the highest feu-duty or rent that can be got, such feus or long leases not exceeding one-eighth part of its value for the time. The feu or lease shall be without grassum, fine or valuable consideration, except the duty or rent, under the sanction of nullity. The powers of the deed of entail are saved (*d*). (4.) The leases here contemplated are leases of the nature of *alienations* (above, § 25).

(*a*) 3 and 4 Vict., c. 48, in App.
(*b*) 11 and 12 Vict., c. 36, § 4, 6.
(*c*) The Act, § 3.
(*d*) The Act, § 24.

47. STATUTORY POWERS OF CHARGING OR AFFECT-

ING WITH DEBT. (1.) These as respects improvements, and provisions to wives, husbands and children, have been already considered, and apply only to existing entails. (2.) By the Rutherfurd Act, the proprietor in possession being of full age, is empowered to charge the estate in whole or in part with debts or incumbrances, under the authority of the Court, with the same consents as would enable him to execute an instrument of disentail, subject always to the provision as to the disclosure of entailer's debts, &c. (*a*). The power applies to both existing and future entails, but is not extended to the only heir of entail in existence for the time, and unmarried, but who may, in the first instance, in existing entails, proceed by disentail under a former clause (*b*). (3.) Creditors of an heir in possession empowered by himself alone to acquire the estate in fee simple, shall be entitled to affect it for payment of debt, and have the same rights and interests therein as if an instrument of disentail had been duly executed and recorded—a provision which applies both to existing and future entails, and, as respects existing entails, includes the creditors of a sole heir empowered under sect. 3 (*c*). But the privilege thus conferred will have no operation against the estate when held by the heir on his right of apparency, unless he has been in possession for a period of three years. The provision of the Act can only operate in consistency with the ordinary feudal rules, which it does not affect or suspend. (4.) Where the estate may be charged with debt by the heir in possession, by granting bonds and dispositions in security freed from the fetters of the entail, and where such charge is made competent by any Act of Parliament, without a power of sale to the heir in possession, and in all cases where the fee of the estate is charged with debt, he may sell the necessary portions under the authority of the Court (above, § 45. 6.) Powers to charge the estate with debt are frequently contained in private Acts.

(*a*) 11 and 12 Vict., c. 36, § 4, 6.
(*b*) The Act, § 3.
(*c*) The Act, § 11.

48. STATUTORY POWERS OF DISENTAILING.—1. *Without consents.* (1.) Any proprietor of entail in possession under an entail dated on or after 1st August 1848, born after the date of the entail, or if in possession under an existing entail, born on or after 1st August 1848, being of full age, may acquire the estate in whole or in part in fee-simple, by executing and recording in the Register of Tailzies under the authority of the Court, an instrument of disentail in the form and manner prescribed by the Act (*a*). (2.) The only heir of entail, under a tailzie dated prior to 1st August 1848, in existence for the time and unmarried, may in the same manner and form acquire the estate in whole or in part in fee-simple (*b*). (3.) The terms, *only heir of entail in existence for the time*, may involve questions on the construction of the destination. For example, although the words *heirs whomsoever* or *heirs or assignees whomsoever*, of the granter or of the last substitute, import a fee-simple in the heir of line, who is therefore not an heir of entail, it may happen that intermediate branches of the destination make mention of heirs whomsoever, (heirs-portioners being excluded,) of particular heirs, and the entail contains future nominatim substitutes and their heirs. The existence of these, as being heirs of entail, of course precludes disentail by a prior heir (*c*). (4.) The term *fee-simple*, as defined by Lord Stair, is inconsistent with a destination to heirs of provision, and not merely imports that the power of uncontrolled disposal of the estate by sale or voluntary conveyance, and of affecting it with debt, is possessed by the proprietor, but means a fee descendible to *heirs whomsoever* (*d*). Care has been taken, therefore, so to explain the effect of the instrument of disentail as to make it clear that the rights of the heirs-substitute are not directly affected, the operation of the instrument being limited to free-

dom from the conditions, provisions and clauses prohibitory, irritant and resolutive of the entail. Accordingly it is only after disentail, and by a substantive act, that alteration of the course of succession is competent (*e*).

2. *With consents.*—(1.) The heir in possession *under an existing entail*, although born before the 1st of August 1848, being of full age, is empowered to acquire the estate in whole or in part, in fee-simple, in the form and manner above mentioned, with the consent of the heir next in succession, of the age of twenty-five, and not subject to any legal incapacity, being heir-apparent under the entail of the heir in possession, and born on or after the 1st August 1848 (*f*). (2.) The proprietor in possession *under a future entail*, although born before the date of the entail, being of lawful age, may in the like form and manner acquire the estate in whole or in part, in fee-simple, with the consent of the heir-apparent, born after the date of the tailzie, of the age of twenty-five, and not subject to any legal incapacity (*g*). (3.) The proprietor in possession *under an existing entail*, may acquire the estate in whole or in part, in fee-simple, in the same form and manner, 1st, with the consents of the whole heirs of entail, if there be less than three in being at the date of the consents, and at the date of presenting the application for the authority of the Court; 2d, or otherwise, with the consents of the three nearest heirs, who, at those dates, are entitled to succeed in their order immediately after the heir in possession; 3d, or otherwise, with the consents of the heir-apparent under the entail, and of the heir or heirs, not fewer than two, including the heir-apparent, who in their order would be heir-apparent; it being provided that the nearest heir of entail for the time shall, in all cases, be twenty-five years of age, and not subject to any legal incapacity (*h*). The *third* case may be included within the *first*, and is only operative as a separate and substantive power, where there are three or more heirs-substitute, two of whom are in the

position described. (4.) The term *heir-apparent*, which in Scotch law language properly means the unentered heir of an ancestor who died infeft, is defined by the Act to import the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect (*i*). Thus the *heir-apparent under the entail* may mean an heir of the body, a *nominatim* substitute, an heir introduced into the destination by a deed of nomination executed under a power reserved in the deed of entail, &c. as the case may be; the question in all cases turning on the legal import of the destination, in like manner as in the service of an heir of tailzie, with this difference only, that in the latter case it is enquired who is the heir entitled to succeed on the death of the ancestor, and in the former, in whom the right of succession must vest in the event of his survivance. (5.) In cases not excluded by the Act, the Court may, in the application for authority, appoint guardians to heirs of entail under age, or subject to legal incapacity, who may, with or without consideration as respects their ward consent for him; and by so doing they shall not incur any responsibility, unless it be alleged and proved that they acted corruptly. But the heir in possession, and the other heirs whose consents are required, are excluded from the offices of tutor, &c. (*k*). (6.) The cases excepted are consents by heirs-apparent and the nearest substitute or heir presumptive under the entail, which (unless in excambions) are only competent by those heirs themselves, and that after attaining the age of twenty-five years complete (*l*).

3. *Form and effect of consents.*—The consents of heirs or their guardians are to be duly tested, and otherwise in the form to be fixed by Act of Sederunt; and they are declared not to be revocable (*m*).

4. *Creditors, &c. protected.* (1.) The heir in possession *under any entail existing or future*, applying to the Court for authority to disentail in whole or in part, or to sell, alienate, dispone, charge with debts or incumbrances,

lease, feu or excamb the estate or any part of it, shall produce his affidavit, setting forth either that there are no entailer's or other debts, and no provisions to widows or children affecting or that may be made to affect the fee of the estate or the heirs of entail, or setting forth the particulars of such of the said debts or provisions as may exist, and the names, &c., of the creditors; and the Court may appoint intimation to be made to them, and order provision to be made for the debts and provisions, or for the protection of the creditors, before or as a condition of granting the authority sought by the petition. The neglect of any creditor to come forward will not affect his right to proceed as below (*n*). (2.) Any party in right of any such debt or provision that may be made to affect the fee, and who, within a year from the date of recording an instrument of disentail in the Register of Tailzies, shall use and record inhibition against the heir in possession, may affect the estate and have the like preference as if no such instrument had been recorded (*o*). (3.) Where an heir in possession, *under an existing entail*, or the heir-apparent (in the sense of this Act,) shall, by a joint or separate obligation in any marriage-contract, have secured the estate upon the issue of the marriage, it shall not be competent to them, or either of them, to apply for or consent to the disentail of the estate, until a child of the marriage capable of taking under the contract, shall, personally or by his guardian, consent to the disentail, or until the marriage shall be dissolved without such child being born, unless the marriage-contract trustees or the parties empowered to carry the provisions into effect, shall concur in the application or consent (*p*). (4.) An heir, *under an existing entail*, who has borrowed money previous to the passing of the Act, (14th August 1848,) on the security or credit of his right of succession to or interest in the estate, shall have no power to consent to any application opposed by a creditor to whom he is indebted in respect of money so borrowed,

and who is either infeft in security, or shall enter appearance and prove his debt in the course of the proceedings; it being competent to the Court to disallow the objection on an offer of security, or other good ground (*q*). (5.) If such heir has borrowed money subsequent to the passing of the Act, (the entail being an existing entail,) he shall have no power to consent to an application for disentail, except under the like circumstances as would have enabled him to give consent, had the loan been previous to the 1st of August 1848; but the consents of the other heirs-substitute shall be given and allowed independently of the rights of creditors (*r*). The rubric of this section is erroneous in referring to *future tailzies*.

5. *Title of the Heir.*—(1.) The acts permitted by the statute may be done by the proprietor in possession, whether the deed of entail be recorded in the Register of Tailzies or not, or whether he be infeft in the estate or not (*s*). (2.) No difficulty can arise from want of registration, or where the heir holds on a mere personal right under an entail not feudalised. In these cases the disentail will have immediate and full effect. (3.) But where the heir in possession is in apparency, his acts done in that position will not have their complete effect unless validated by his subsequent infeftment. There are no words in the Act to suspend the operation of the ordinary feudal rules, and therefore, while, on the one hand, the feudalized entail cannot be extinguished by an heir holding on apparency, so, on the other, there is nothing to prevent the operation and effect of his entry subsequent to the instrument of disentail, by accretion.

(*a*) 11 and 12 Vict., c. 36, § 1, 2, and Schedule.

(*b*) The Act, § 3.

(*c*) Ersk. 3, 8, 32; Leslie, 15th Dec. 1710, M. 15,358; Lord Corehouse in Mure, 16th Feb. 1837, 15 D. B. M., 581; Stirling, 28th May 1845, 7 N. S. 640.

(*d*) Stair, 2. 3, 43.

(*e*) The Act, § 32, and Schedule.

(*f*) The Act, § 2.
(*g*) The Act, § 1.
(*h*) The Act, § 3.
(*i*) The Act, § 52.
(*k*) The Act, § 31.
(*l*) The Act, § 1, 2, 3.
(*m*) The Act, § 50.
(*n*) The Act, § 6.
(*o*) The Act, § 7.
(*p*) The Act, § 8.
(*q*) The Act, § 9.
(*r*) The Act, § 10.
(*s*) The Act, § 42.

49. INSTRUMENT OF DISENTAIL.—1. *Form, &c.*—The form of this important instrument is given in a Schedule to the Act, *(see Appendix)*. (1.) The Instrument of disentail when duly presented under authority of the Court for that purpose, is to be recorded in the Register of Tailzies, along with the decree of Court on which it proceeds (*a*). This provision would seem to point at a separate application for the authority of the Court for the special purpose of such registration; and for this there is the obvious reason, that until the instrument shall have been produced in Court duly executed, an order for its registration would be premature, and might warrant the registration of an informal document. But the separate application may, it is thought, be made with due regularity by motion in the original petition, as is customary in those cases where contracts of excambion are executed under the authority of the Court, in virtue of the Rosebery Act. (2.) Instruments of disentail and decrees of the Court may be recorded in the appropriate Register of Sasines, but no particular effect is given to such registration (*b*).

2. *Effect.*—(1.) The Instrument when duly executed and recorded as above, shall have the effect of absolutely freeing, relieving and disencumbering the entailed estate and the heirs of entail of all the prohibitions, conditions, restrictions, limitations and clauses irritant and

resolutive of the tailzie, and of entitling the proprietor in possession to alter the order of succession, to alienate and dispone onerously gratuitously, to burden the estate with debt, and to do any other act or deed competent to a fee-simple proprietor (*c*). (2.) The Act saves the effect of charges, burdens and incumbrances, rights and interests, held by third parties, affecting the fee or rents of the estate, and the rights and interests of the heirs of entail other than those constituted by the tailzie (*d*). (3.) The instrument of disentail so recorded, shall, as regards third parties acting *bona fide*, be no longer reducible on any ground of irregularity or noncompliance with the provisions of the Act, where the decree authorising disentail has not been appealed from, or not brought under reduction upon any relevant ground within the time allowed for appealing (*e*).

(*a*) 11 and 12 Vict., c. 36, § 32.
(*b*) The Act, § 44.
(*c*) The Act, as in (*a*).
(*d*) The Act as in (*a*).
(*e*) The Act, § 38.

50. MISCELLANEOUS PROVISIONS OF THE ACT OF 1848. 1. *Purchase money.* (1.) When money is derived from the sale or disposal of any portion of an estate held *under any entail existing or future*, or any right or interest therein, or in respect of any permanent damage to the estate under any private or other Act of Parliament, and where the heir in possession could acquire to himself the estate in fee-simple under the Act, he may apply for and obtain the authority of the Court for payment of such money as belonging to himself in fee-simple; but if otherwise, he may, with the authority of the Court, lay out the money in or towards payment of entailer's debts, or of sums charged on the fee of the estate under any Act of Parliament, or in redemption of the land tax, or in permanently improving the estate, or in repayment of money expended in improvements; and any surplus exceeding £200, shall be

applied as the whole money would have been applied but for this Act, and if under £200, the surplus shall belong to the heir in possession (*a*). The first part of the clause seems to be generally applicable to the power of disentail, whether belonging to the heir in possession *with* or *without* consents. (2.) There is no provision in words for the disposal of a surplus of the exact sum of £200, but as the surplus is only to belong to the heir if less than that amount, it would probably be held that the *jus crediti* of the future heirs would attach to the surplus if amounting to £200, so as to secure its investment in terms of the entail of the principal estate.

2. *Trust money.*—The above provisions are made applicable to money invested in trust for the purchase of lands to be settled on the heirs of entail, under the fetters of the entail of the principal estate.

3. *Money and lands directed to be entailed.*—(1.) When money or other property real or personal, has been or shall be invested in trust, for the purchase of land to be entailed by an original entail, or land has been or shall be directed to be so entailed, but the direction has not been carried into effect, the party, who, if the entail had been executed, would be the proprietor in possession, and who, in that case, might have acquired to himself the lands in fee-simple by disentail under the Act, may summarily apply for and obtain the authority of the Court for payment of such money or the conveyance of such land to himself in fee-simple, the same consents, if any, being necessary, as would have been required to the acquisition of such land in fee-simple, if actually entailed (*b*). (2.) The date at which the Act of Parliament deed or writing placing the money or property under trust, or directing it to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made in execution of the trust, whatever the actual date of such entail (*c*). (3.) Money or other property, real or

personal, which has been or shall be invested in trust for the purchase of lands to be entailed, or lands which shall have been directed to be entailed but are still unentailed, may be dealt with under the Act in all respects as they might have been dealt with if entailed in terms of the direction. For example, if the direction should be incomplete as respects any prohibition, it will be invalid and ineffectual as an obligation to execute an entail (*d*).

4. *Securities protected.*—No irritancy committed or that may be committed by an heir of entail, shall affect in the persons of purchasers or *bona fide* onerous creditors, any conveyances, deeds or securities granted in reference to the estate or its rents, prior to the execution of the summons of declarator on which decree in respect of any irritancy shall proceed (*e*). The enactment applies to all entails, whether *existing* or *future*.

5. *Irritant and resolutive clauses implied in future entails.*—It is made unnecessary to introduce these clauses into those deeds of entail made on or after 1st August 1848, which contain an express clause authorising registration in the Register of Tailzies. Such clause of registration shall have the same operation and effect as the most formal irritant and resolutive clauses duly applied to every prohibition, condition and restriction not specially excepted. The clause shall be recorded in the Register of Tailzies as part of the deed, and inserted or duly referred to, in the manner now required by law, in all procuratories of resignation, charters, decrees of special service, precepts and instruments of sasine following on the tailzie (*f*).

6. *Defective entails invalid in whole.*—(1.) Entails not valid and effectual as respects every one of the leading prohibitions against alienation, contraction of debt and alteration of the order of succession, in consequence of defects either in the original deed of entail or the investiture following on it, shall, after the passing of the Act (14th August 1848) be invalid and ineffectual as to all the pro-

hibitions, and the estate subject to the deeds and debts of the proprietor in possession, and the substitutes who shall take the succession in their order (*g*). The enactment applies to *existing* as well as *future* entails.

7. *Irritancy excluded.*—No forfeiture or irritancy shall be incurred by anything done under the authority of the Act; nor any deed, instrument or writing granted under its authority, held as a contravention of or affected by the restraining clauses of the entail (*h*). This provision likewise applies to all entails.

8. *Act of* 1685 *repealed in part.*—The original statute of entails is repealed, to the effect of making the Act operative but no farther (*i*).

9. *Indirect entails excluded.*—(1.) *Trust rights* are limited to persons in life at the date of the deed; and a party born after that date shall, when of full age, hold the subject of the trust grant as a fee-simple proprietor, and may, on application to the Court, obtain an act and decree to that effect, which, when recorded in the appropriate Register of Sasines, shall operate as a disposition and infeftment in his favour. The rights of the superior, of creditors and others held independently of the trust-settlement are saved (*k*). (2.) *Liferent rights* are in like manner limited to persons in life at the date of the grant; and any party born after that period, when of full age, shall have the same rights as above mentioned, and may acquire a fee-simple title by obtaining an act and decree of the Court and recording it in the proper Register of Sasines, the rights of superiors and others being reserved (*l*). (3.) *Leases* whether direct or to trustees, shall be ineffectual to limit the right of a party of full age, who was born after the date of the deed, or restrict or abridge his possession or enjoyment of the subject in favour of any future heir; the right of the proprietor to enforce *bona fide* stipulations in his favour being saved (*m*).

10. *Applications to the Court.*—(1). These refer to all the provisions of the Act as to which the authority of

the Court is required, whether as regards *existing* or *future* entails, and are to be in the form of a summary petition, (see Appendix.) (2.) The petition shall set forth the tailzie, the date of the applicant's infeftment, if he be infeft, and the names, designations and places of abode so far as known to him, of the heirs substitute, if any, whose consents are required, and whether they are of age to consent; otherwise their legal guardians shall be described in the same manner; and if those substitutes, or any of them, are the children of the petitioner, and minors or legally incapacitated, it shall be so stated; and the petition shall also state to what extent, and in what way and manner it is proposed to affect the estate (*n.*) (3.) It shall not be necessary to call any other heirs than those whose consents would be necessary to an instrument of disentail; and no other heirs shall be entitled to appear in the proceedings (*o*). (4.) The petition besides being intimated in the usual form, is to be advertised once in the *Edinburgh Gazette*, and at least once weekly for six successive weeks, in one or more newspapers, the leading name of the lands being a sufficient description (*p*). (5.) The prayer of the petition shall be granted in so far as the acts proposed to be done may appear to be permitted; or the Court shall do otherwise as may seem proper and consistent with the Act; and any party having interest and not excluded by the Act may, before decree is actually pronounced and extracted, appear and object to the prayer of the petition. The Court may decern for the expenses against any of the parties, or appoint them to be paid out of the estate or fund (*q*).

11. *Acts of Sederunt.*—The Court are empowered to pass such Acts of Sederunt as they may deem proper for the farther regulation of the forms of procedure under the Act, and otherwise for rendering it more effectual according to its true intent and meaning (*r*).

12. *Act against accumulation of profits, &c.*—The Act of the 39th and 40th of Geo. III. is extended to Scot-

land as respects heritable property. It was before applicable to moveable property (*s*).

(*a*) 11 and 12 Vict. c. 36, § 26.
(*b*.) The Act, § 27.
(*c*) The Act, § 28.
(*d*) The Act, § 43.
(*e*) The Act, § 40.
(*f*) The Act, § 39.
(*g*) The Act, § 43.
(*h*) The Act, § 45.
(*i*) The Act, § 46.
(*k*) The Act, § 47.
(*l*) The Act, § 48.
(*m*) The Act, § 49.
(*n*) The Act, § 33.
(*o*) The Act, § 36.
(*p*) The Act, § 34.
(*q*) The Act, § 35.
(*r*) The Act, § 51.
(*s*) 39 and 40 Geo. III. cap. 98, in Appendix; More's Stair, cccxlii.

51. CONVENTIONAL RESERVATIONS FROM THE PROHIBITIONS (*a*).—The fetters of the entail being duly imposed, certain powers, more or less ample, according to the wish of the entailer, are conferred by the deed on the members of tailzie for special purposes. These may exceed, but cannot limit the statutory powers.

(*a*) See Jurid. Styles, 1. 229. These reservations depend on the pleasure of the entailer, and are not strictly construed. See form of the Entail in Appendix.

52. CONVENTIONAL PROVISIONS TO HUSBANDS AND WIVES.—1. *Locality Lands.*—(1.) The members of tailzie are usually permitted to grant liferent provisions to husbands and wives by way of locality, not exceeding in whole a certain specified proportion of the yearly rental of the estate, the provision so long as a former locality subsists being subject to a deduction of the amount of such locality. But a faculty to grant the provision is not a *surrogatum* for the widow's terce, when excluded by

the entail. To be binding on the succeeding heirs of tailzie, it must be exercised; and an apparent exception from the rule in the shape of a yearly allowance was founded on the natural obligation upon the heir of entail to aliment his mother (*a*). When it is so expressed as to authorise *reasonable provisions*, the Court may exercise an equitable control (*b*). (2.) The object of assigning locality lands for a widower or widow's provision is well explained in the words of the style (*c*), "so as that the liferenters may uplift and receive the rents of their locality lands, and the succeeding heirs of entail may not be engaged or bound for payment thereof, or the fee and property of the said lands afterwards affected therewith." But this form of provision is not approved of in modern practice, as it interferes with the management of the estate. A power to give infeftment in jointure lands by way of locality differs from a mere faculty to grant bond for a certain proportion of the free rents of the estate. The latter is estimated according to the rental of the year of the granter's death, whereas, by the former, the wife obtains a certain portion of the lands themselves, which are set aside for her support, and in which she obtains a real and perfect right of liferent. The question, in judging of a right of this nature, is simply whether the provision be warranted by the deed of entail, and if so warranted, it cannot be afterwards restricted on an emerging reduction, from whatever cause, in the yearly value of the remainder of the estate. The locality is constituted as at the date of the deed by which it is conferred, without regard to that of the infeftment upon it, although it cannot take effect until the death of the granter (*d*). The grantee must, on the other hand, necessarily suffer by a fall in the value of the locality lands. (3.) A locality which included a right of patronage was sustained under a power in the entail to grant "competent portions and conjunct fees by contract of marriage" (*e*). (4.) The right must be exercised as one of liferent, *salvâ rei substantia*, and thus the beneficiary has no title to work

mines and minerals, unless it was plainly the intention of the grantee to include them (*f*). (5.) The expense of building or repairing churches, manses, school-houses and school-master's dwelling-houses, is a burden on the heir of entail (*g*). (6.) A widow having right to locality lands cannot suffer by a conventional arrangement between the heir and tenants as to the terms of payment of the rents (*h*).

2. *Annuity.*—(1.) Rental as a rule for fixing the amount of the annuity, means the free rental of the year of the granter's death (*i*). (2.) In the rental are included the rents of coal and lime-works, game and fishings, but not the rent or yearly value of the mansion-house or pleasure ground (*k*). (3.) Deductions have been sustained of an improving debt, but not of the expense of embanking a river, or repairing the church, or of the salary of a factor or collector of rents (*l*). (4.) The ordinary rule as to an heir-apparent three years in possession receives effect, as the power so far as it goes is equivalent to that of a fee-simple proprietor (*m*). (5.) A provision by way of aliment not under the entail depends on natural obligation as respects the succeeding heirs (*n*). See *Provisions under Statutory powers.*

(*a*) Campbell, 16th Dec. 1818, F. C. See Jackson, 24th Dec. 1836, 15 D. B. M. 313.

(*b*) See E. Mar, 3d Dec. 1830, F. C. and 9 S. 126; affirmed, 28th September 1831, W. S. 5.

(*c*) Jurid. Styles, 1. 229.

(*d*) Agnew, 12th Dec. 1810, F. C. (p. 161.); Malcolm, 21st Nov. 1823, F. C., 2 S. 453. The clause was in these terms: "Reserving always notwithstanding of the prohibitory clauses above written power and liberty to the said Margaret Malcolm and the other heirs of tailzie above specified, to provide their husbands and wives in suitable liferents by way of locality not exceeding the half of the present rent of the estate for the time."

(*e*) D. of Roxburghe, 25th June 1818, F. C.

(*f*) Ivory's Ersk. 2. 9. 57 and auth. cit., particularly Swinton, 1st Feb. 1814, F. C.; Sandford on Entails, 372-3.

(*g*) Anstruther, 14th May 1823, F. C., 2 S. 269.

(*h*) Chisholm or Gooden, 2d Dec. 1829, 8 S. 165.

(*i*) Countess of Glencairn, 26th Jan. 1804, noticed in Agnew as in (*d*); Douglas, 15th May 1822, F. C., 1 S. 382; Campbell, 21st May 1831, 9 S. 624.

(*k*) Douglas, as in (*i*); Macpherson, 24th May 1839, 1 N. S. 795; Craigie, 16th Feb. 1843, 5 N. S. 651.

(*l*) Macpherson, as in (*k*).

(*m*) Glencairn, 23d May 1800, M. App. *Heir-apparent*, No. 1.

(*n*) Lowther, 15th Dec. 1786, M. 435; Gibson, 1st March 1798, M. 5891; Campbell, 25th Feb. 1809, F. C.; Campbell and Jackson, as in (*a*). See Sandford on Entails, p. 374-5.

53. CONVENTIONAL PROVISIONS TO CHILDREN.—1. *According to Rental.* (1.) A power in the entail to provide younger children, has usually had reference to and been limited by the amount of the free rents of a certain number of years, whence the rule of the Aberdeen Act. The questions hence arising have been numerous. (2.) It has been fixed that the rent of the year in which the granter of the provision died is the rule, not that of the year in which the bond bears date (*a*). (3.) The proper deductions have been long the subject of discussion, without being yet definitively settled. It was maintained, but without success, that the income-tax, the house and window duty, and the expense of rebuilding a manse were to be deducted (*b*). A power to grant provisions not exceeding three years' free rents so far as the estate was "free and unaffected at the time with liferents," implies the deduction from the free rent of the widow's jointure before computing the amount of the provision (*c*). (See also the cases under the Aberdeen Act, above, § 43.) (4.) The amount permitted by the entail is not so to each heir in succession, but to the heirs as a collective body, so that there can never be a larger burden at one and the same time than the sum contained in the power (*d*). (5.) The power is competent to an apparent heir three years in possession (*e*).

2. *Mode of exercising the power.*—(1.) The power has usually been exercised by means of personal bonds binding the heirs of tailzie. Thus a power to provide two

years' free rent, but not in the shape of real security over the lands, by which the ground might be poinded or the lands adjudged, and with right merely to possess the lands subject to the powers, conditions, and limitations of the entail, and to pursue tenants and intromitters, was sufficiently exercised by an obligation on "heirs of line, tailzie as well as provision," and other successors in the lands and heritages *(f)*. Thus also a power to burden and affect the lands with sums of money for the suitable provision of younger children, was validly exercised by the granter burdening himself and his heirs of tailzie and provision in the estate. Here the Court ultimately held that, in the circumstances, personal diligence for the principal sum in the bond was not competent under such a power against the heir in possession, although the estate was subject to adjudication (*g*). (2.) Again, under a faculty to contract and take on debts for the provision of younger children, not exceeding three years' free rent, after deduction of liferents and real debts and the annual rent of personal debts, it was held that the heir in possession was entitled to postpone the obligation, by binding himself and his heirs of tailzie succeeding to him in the lands and estate, to make payment on his death, in case he should die without heirs-male of his own body, or if he should leave heirs-male, at the term of Whitsunday or Martinmas next after the death or failure of the last heir-male of his body. Provisions granted under such a power were regarded as on the same footing with entailer's debts, and a burden therefore upon the estate and the succeeding heirs, in the manner in which the obligation may be imposed by a party empowered (*h*). (3.) It has been held that under a power to provide younger children, it was competent to grant a provision to grandchildren, not the children of the presumptive heir of entail (*i*). But in the reported case, the terms of the power were so ambiguous as to found an argument that the fund for satisfying the provision was intended not merely for the

children of heirs in possession, but also for those of other heirs of tailzie. (4.) A provision of a capital sum payable by the next heirs within a limited term of years, is not warranted by a power to provide so many years' rent which shall continue a burden on the heirs on their paying the interest, and it was, in one instance, restricted to the annual interest of the provision (*k*).

3. *Effect*—(1.) A provision not made a burden on the lands but the rents only, cannot be paid out of funds derived from the sale of a portion of the estate for redemption of the land-tax, and subject to re-investment (*l*). (2.) When duly imposed under a power to charge the fee of the estate, the provision resembles an entailer's debt, and the estate is liable to be attached for principal and interest, which form also a burden on the succeeding heirs to the extent of the provision; and thus large arrears of interest, which had been allowed to accumulate, were held to affect the estate (*m*). (3.) The distinction between a provision under a power in the entail, unrestricted by a declaration that it shall not affect the fee of the lands, and a provision under the Aberdeen Act, is thus apparent. The latter is not on the footing of an entailer's debt, because it does not warrant adjudication of the estate, while the former as having this effect is necessarily preferable, as respects the estate, to the debts of future heirs which do not affect the fee, and as respects the rents, to those which have not been made a burden on the liferent right. (4.) The doctrine of *confusio* has no application to such obligations, if the question is to be held as absolutely fixed by the latest case on the subject (*n*). *Confusio*, according to Stair, operates merely by a suspension of the obligation (*o*); and in reference to this particular question upon the power in deeds of entail, it had by a long train of authorities been definitely settled that the heir in possession being heir of entail only, and not heir under an universal passive title, by acquiring right in favour of himself and his heirs whomsoever, to a provision affecting the estate or its rents, did not

thereby extinguish the burden, which remained suspended merely during the period of his own possession, unless it appeared from the deed that it was his intention so to do (*p*). Even the effect of a clause of discharge was held to yield to the presumption arising from the assignation in the same deed (*q*); and it had been decided that claims thus acquired were affectable by the creditors of the heir, but that he was bound to keep down the interest due on them during his possession, an obligation not inconsistent with the rule that the claim is suspended *confusione* (*r*). The judgment in the case of Welsh goes the length however of sustaining the bonds as a source of credit in the person of the heir in possession, to the effect of giving his assignees a claim in bankruptcy, not merely against the heir, but the rents, according to the priority of the security, thus holding that the claim as against the estate is not suspended even as respects interest. (5.) The practical result from the cases above noticed, is to give full power in future entails to charge the fee of the estate with children's provisions, to the extent of a fixed capital sum.

(*a*) E. of Rothes, 29th Jan. 1829; 7 S. 339. See Campbell, 21st May 1831, 9 S. 624.

(*b*) Elliott, 17th Nov. 1813, F. C.

(*c*) M'Donald, 18th May 1836, 14 S. 785. This case is an example of provisions to a wife and children by one and the same deed, and under a clause in the entail which required the rent to be taken on the one hand, for the purpose of calculating the jointure, under deduction of the interest of the children's provisions, and on the other hand, for calculating the children's provisions under deduction of the jointure. See the Report of the Accountant, which contains a formula for the calculation.

(*d*) Corbett, 12th Feb. 1840, 2 N. S. 573.

(*e*) Kennedy, 11th Feb. 1829, 7 S. 397.

(*f*) Crawford, 11th March 1809, F. C.

(*g*) Cleghorn, 18th Jan. 1833, re-decided on remit, 31st Jan. 1837, 3 N. S. 1, affirmed, 27th Aug. 1839, 1 M'L. and R. 1033.

(*h*) Howden, 17th June 1834, 12 S. 734, affirmed, 14th May 1835, 1 S. and M'L. 739.

(*i*) Sandford on Entails, p. 377; E. of Wemyss, 23d Nov. 1810, F. C., and case of Houston, 28th Jan. 1756, referred to.

(*k*) Viscountess Strathallan, 20th May, 1840, 2 N. S. 840.

(*l*) Anderson, 18th Nov. 1814, F. C.

(*m*) Howden as in (*h*). But see Cleghorn as in (*g*), as to competency of personal diligence against the heir in possession, when the power is to burden the estate; Duchess D. of Richmond, 2d Dec. 1837, 16 D. B. M. 172.
(*n*) Welsh, 11th Feb. 1837, 15. D. B. M. 537.
(*o*) Stair, 1. 18. 9.
(*p*) Ersk. 3. 4. 27; More's Stair, cxxxvii. and cases cited; Crawford, 11th March 1809, F. C. The question here was with a future heir of entail.
(*q*) Ker, 15th Feb. 1758, M. 15,551.
(*r*) Gordon, 1st Dec. 1757, M. 11,161.

54. CONVENTIONAL POWERS OF FEUING, &c.—1. *Power to grant feu-rights* (*a*). It may be of advantage to give a power to the heirs of entail to grant feu-rights under certain regulations, and the clause will be so framed as to prevent the members from defeating the entail by a fraudulent exercise of the power. This was attempted against the Roxburghe entail (*b*).

2. *Power to sell for particular purposes.*—A power may be granted to sell for payment of the debts of the entailer (*c*), but this is best effected by means of a trust (*d*); or for the purpose of acquiring other lands adjacent to the mansion-house or principal branch of the estate. This, like other similar relaxations, is liable to abuse.

3. *Power to exchange portions of the estate.*—The excambion of detached parts of the lands for other lands more conveniently situated is sometimes permitted. Excambions may be carried through in virtue of the statutes under certain defined regulations. *See Excambion.*

4. *Power to grant leases.*—It is not unusual to fortify the prohibition to alienate by an express restraint from granting tacks for longer than twenty-one years, and without grassum or diminution of the rental. Where it is advisable, from peculiar circumstances, to sanction agricultural leases of a portion of the estate of an endurance beyond the ordinary term of twenty-one years, the clause may be so framed as to be both restrictive and permissive, prohibiting leases in general for a longer period, and empowering the member in possession to ex-

tend the ordinary term in those cases which the entailer has in view (*e*).

(*a*) SAVING and RESERVING always full power and liberty to each of the heirs and persons succeeding to the said lands and estate notwithstanding the prohibition aforesaid for the sake of erecting villages or the increase and enlargement of those already erected and for the encouragement of trades and manufactures and accommodating artificers or tradesmen or other persons employed therein (*other purposes*) to grant feus of any part of the said tailzied estate not encroaching on the manor-place of D. pleasure-ground deer-park policy or inclosures presently appropriated to the use and accommodation of the proprietor (*bounds excepted according to circumstances*) and for the accommodation and convenience of the mansion-house and residence of the family: no feu so to be granted exceeding part of an acre and the feu-duty not to be under the rent which the lands pay at the time doubling it upon the entry of an heir and tripling it on the entry of a singular successor at the least *Note.*—When it is intended that the same person shall not be capable of holding more than one feu at a time, this must be expressed. See M. Abercorn, 26th Jan. 1816, F. C.

(*b*) See Innes, 12th Jan. 1808, M. App. *Tailzie*, p. 60, No. 18. *(Clause.)* "RESERVING always liberty and privilege to our said heirs of tailzie to grant feus tacks and rentals of such parts and portions of the said estate as they shall think fitting provided the same be not made and granted in hurt and diminution of the rental of the said lands and others foresaid as the same shall happen to pay the time the said heirs shall succeed thereto." The power being unlimited, feus were granted of the whole estate to a favoured individual; but they were set aside as *in fraudem* of the entail, the feus contemplated by the entailer being held to be grants in the ordinary course of management and administration, not such as would convert the right of the heirs of entail into a mere annuity.

(*c*) See Kilburney, 20th Jan. 1669, M. 15,347.

(*d*) Jurid. Styles, 1. 244.

(*e*) Jurid. Styles, 1. 231.

55. IRRITANT AND RESOLUTIVE CLAUSES. — 1. *Import and Effect.*—(1.) These clauses are essential to the strict entail as framed and expressed prior to the late statute, and consequently to all entails dated before 1st August 1848. Deeds of entail made on or after that date need not contain those clauses, it being provided that a clause of registration in the Register of Tailzies, followed by the registration of the deed under the statute of 1685, and of the clause as part of the deed, shall have the same opera-

tion and effect as the most formal irritant and resolutive clauses duly applied to every prohibition, condition, restriction and limitation not specially excepted from such effect. It is also provided that the clause of registration shall be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of sasine following on the tailzie (*a*). It will be the duty of the conveyancer to omit, therefore, the irritant and resolutive clauses in framing a new entail, as the statutory protection to the prohibitions is complete. (2.) Although the statute does not limit the penalties of contravention to the contravener himself, it seems unnecessary to declare in express words in future entails that such is the intention of the entailer. The words of the statute of 1685 which declare that the contravener shall forfeit for himself and *his heirs*, have been construed not to extend to the heirs of the contravener's body, unless it is so expressed in the entail (*b*). (3.) The irritant declaration annuls the acts and deeds done in contravention of the conditions and prohibitions of the entail, and the resolutive forfeits or resolves the right of the contravener; but although a substantive effect belongs to each, they are described in the statute of 1685 simply as clauses irritant, and were competently so referred to in the deed of entail (*c*). (4.) It was at one period maintained that those clauses were not indispensable for producing a substantive effect, and that a simple prohibition to dispone or contract debt, whereby the estate might be evicted, necessarily implied an irritancy of all deeds done to the contrary (*d*). But although the statute of entails does not in words declare that the irritant and resolutive clauses are essential for protecting the conditions and fetters of the entail, the inference from its terms has uniformly been considered by the Court to be inevitable, when regarded in connection with the views taken by the Judges in the case of Stormont, which preceded the enactment. (5.) Still it was not until after much discussion that the modern notion

of the combined operation of the clauses was generally received. It appears, indeed, to have been held by the House of Lords in an early case, that a prohibition to contract debt with a declaration irritant of the debt contracted was effectual to protect the lands, without any declaration resolutive of the right of the contravener (*e*). But the decisions have since been uniform in support of the rule, that both an irritant and a resolutive clause were essential to secure the fetters of the entail. Thus, the omission of the former is fatal, although the latter be duly expressed; and on the other hand, an irritant does not supply the place of a resolutive clause (*f*). (6.) The necessary consequence of a defect in either the irritant or resolutive declaration is to leave the members of tailzie unfettered by the prohibitions against selling or contracting debt: they may dispose of the estate for onerous causes without being accountable for the price, or burden it at pleasure, and it may be adjudged by creditors in like manner as a fee-simple estate, the heir being in this last case liable for the debts of a preceding heir (*g*). In regard to the effect of a prohibition against altering the order of succession, or alienating the estate, not contained in a strict entail and therefore unprotected by the statutory irritancies, see the Feudal Conveyancing.

2. *Structure of the clauses.*—(1.) By the usual form of the irritant and resolutive clauses in existing entails, they are intimately combined, and the acts and deeds of the members of tailzie referred to in general terms. They consist, *first*, of a general declaration resolutive of the right of the contravener; *secondly*, of a declaration irritant of his debts and deeds, and of all adjudications, or other legal execution or diligence following upon them; and, *lastly*, of a declaration resolutive of the right of the members of tailzie on whose debts and deeds such adjudications shall have proceeded. (2.) The clauses, as given in the Style-book, have been subjected to verbal criticism (*h*); but the objections were considered as by no means of a serious nature. That form

was universally employed by good conveyancers; and although the last branch, consisting of the special declaration against adjudications, may appear superfluous, as, in apparent effect, a repetition of what is contained in the general resolutive declaration with which the combined clause sets out, there can be no doubt that the form had been carefully prepared with a view to embrace every possible instance of contravention, without expressing more than was strictly necessary.

3. *Terms of the clauses.*—(1.) Although expedient it was by no means essential, to follow the ordinary style. The clauses might have been general, or special so as to refer to every prohibited act or deed; or they might without injury to the entail have been repeated after each prohibited act or deed. No strict rule was laid down as to the place and form of their insertion in the deed, and none has been followed in the determination of disputed questions on entails. (2.) But it was essential that the general and special modes of reference should not be mixed up together, without at least carrying out the special reference to the fullest extent. Thus, where the prohibitory and irritant clauses were unexceptionable, but, in the resolutive clause, (which, although commencing with a general reference to the fetters, was controlled by the enumeration of certain acts as specially forbidden,) the power to alienate was omitted, it was held that the heir in possession was not disabled from selling the estate (*i*). The same was the result where the general reference, thus combined with a defective enumeration of particular acts, was declared to be *without prejudice of the specialties* (*k*), and even where the general reference seemed unrestricted in its meaning, but particularised and enforced with respect to individual acts and deeds (*l*). (3.) When, again, the clauses were framed upon the principle of special reference or enumeration, the omission of a particular prohibition in the irritant or resolutive declaration, without any question left the members of tailzie to that extent unfettered. But an enumeration if sufficient

to cover all the essential prohibitions will be sustained, although it do not repeat particulars which were redundant. Thus "selling and alienating" were held to include "selling, alienating, wadsetting, disponing and feuing," and "alienate, and dispone" to embrace "selling, alienating and disponing" (*m*). (4.) The irritant and resolutive clauses must be directed against the institute and heirs according to the rules above explained; but in declaring the nullity of forbidden acts and deeds, it is not necessary to add, in express words, that they shall be ineffectual as against the persons called to the succession. It is sufficient that they are declared to be null and void (*n*). As respects the application of the clauses to the persons restrained, see § 19.

4. *Omissions or defects in reference.* — In another class of cases, where the precise application of the irritant or forfeiting terms to the Acts prohibited is prevented by the omission of words, or even the use of the singular for the plural number, there is much risk of the fetters being found inoperative. (1.) Thus, a mere clerical omission in the irritant clause was held fatal. The clause declared, that *not only the said lands and estate shall not be burdened with, or liable to, the debts and deeds, crimes and acts contracted, granted, done or committed contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents, — shall be of no force, strength, or effect, &c.* Here the nominative to the verb, *shall be*, was omitted, and thus the terms by which the debts, deeds, &c. were declared void, were not connected with the prior enumeration by words occurring in the deed itself; and the House of Lords, following the principle of rigid construction, held therefore that no irritant clause existed effectual to annul the debts and deeds of the heir in possession (*o*). (2.) Thus, also, where a clause of a complex structure, partly conditional, prohibitory, and irritant, contained several distinct and separate declarations or provisions which, in the irritant branch of the clause, were referred to by the terms, *pro-*

vision above set forth, the Court, disregarding the argument from intention, held, that as the word, "provision," did not embrace all the particulars, and could not with certainty be applied to any of them, the heir in possession was not disabled from selling or contracting debt (*p*). (3.) In another class of cases, the result has depended upon the import of generic terms, or words of comprehensive meaning, referring back to the particular prohibitions. In this category are included those cases involving the true signification, as applied to the premises, of the word "*deeds*," which may import an act done, or a conveyance or other writing, according as it is used. Unless specially limited, the double signification is admitted. A careful study of this class of cases is essential to a right understanding of the principles of construction adopted in the able and elaborate judgments delivered on this branch of entail law. (4.) In such cases as Blair-Adam, Overton, Ulbster, and others, the phrase "deeds," or "debts and deeds," occurring in the irritant clause, was connected with the prohibitory clause by such terms as "all which," "all such," &c., and these were held, in strict grammatical construction,—contrary to intention, which is allowed no place in such questions,—to connect solely with the immediately preceding branch of the prohibitory clause, or a concluding prohibition only, so as to leave former prohibited acts unprotected (*q*). In one case, the occurrence of the word, "facts," before debts and deeds, was sufficient to turn the scale the other way (*r*); and in other instances, the sense of "debts and deeds," "deeds," "provision" and similar expressions, has been considered generic, and applicable to all the prohibitions (*s*). The statutory meaning of "deeds," as including "debts," has also been adopted, but in special circumstances (*t*). (5.) Where, again, the words, "debts and deeds," "facts and deeds," or such phrases are applied, in the irritant or resolutive clause, to terms in themselves sufficiently clear and comprehensive, but restricted in a prior part of

the deed by a defective enumeration, the meaning of the phrase will be held to be no broader than that given to it by the party; on the principle that when a word of a flexible meaning is used in a doubtful sense in one part of a deed, if it has occurred in an antecedent part where the meaning is marked, it will be interpreted to have the same application in both places (*u*). All such cases, however, are necessarily in a great degree circumstantial.

(*a*) 11 and 12 Vict. c. 36, § 39.

(*b*) Ersk. 3. 8. 31; Lord Corehouse in Bontine, 2d March 1837, 15 D. B. M. 711.

(*c*) Porterfield, 10th Dec. 1841, 4 N. S. 234.

(*d*) Gardner, 27th Jan. 1744, M. 15,501-3.

(*e*) Craig's Creditors, 13th July 1712, M. 15,494, Robertson's App. 110.

(*f*) Bell's Princ. 1731-2; Reidheugh, 11th March 1707, M. 15,489; Hepburn, 8th Feb. 1758, M. 15,507, affirmed, 7th Dec. 1758; Mitchelson, 15th June 1831, 9 S. 741; Craig's Creditors as in (*e*).

(*g*) Stewart, (*Ascog*) 23d Feb. 1827, F. C. 5 S. 418, as reversed, 4 W. S. 196; Bruce, 21st June 1827, F. C., 5 S. 822, as reversed, 4 W. S. 240; Elibank, 2d July 1833, F. C., 11 S. 858, affirmed, 19th March 1835, 1 S. and M'L. 1; Mitchelson as in (*f*); Campbell, 23d Nov. 1838, 1 N. S. 8; Sinclair, 18th July 1845, 7 N. S. 1085.

(*h*) Elibank, 21st Nov. 1833, F. C., 12 S. 74; E. of Buchan, 23d June 1842, 4 N. S. 1430.

(*i*) Bruce, (*Tillicoultry*), 15th Jan. 1799, M. 15,539.

(*k*) Dick, 14th Jan. 1812, F. C.

(*l*) Horne, (*Ballilieslc*) 17th Jan. 1837, F. C., 15 D. B. M. 372, as reversed, 13th March 1838, 3 S. and M'L. 142. See judgment of Lord Brougham on appeal. The defective enumeration of particulars was *followed* as well as preceded by a general clause referring to the *premises*, a specialty which was disregarded when pleaded in the later case of Thomson; Thomson, 27th Feb. 1839, 1 N. S. 592; E. of Caithness, 26th Feb. 1846, 8 N. S. 553.

(*m*) Anstruther, (*Caiplie*) 26th Nov. 1840, 3 N. S. 142; Lord Duffus's trustees, (*Hempriggs,*) 28th Jan. 1842, 4 N. S. 523, and Martin, 17th July 1844, 6 N. S. 1320. The entail excluded the contraction of debts and giving bond or obligement. The irritant clause applied only to bonds and obligements, and was held ineffectual even as to these, which are merely the vouchers of what are not excluded; Murray, (*Pitlochie,*) 26th Feb. 1842, 4 N. S. 803.

(*n*) Munro, (*Foulis,*) 15th Feb. 1826, F. C., 4 S. 472, affirmed, 3 W. S. 344.

(*o*) Sharpe, (*Hoddam*), 3d July 1832, F. C., 10 S. 747, as reversed, 18th April 1835, 1 S. and M'L. 594.

(*p*) Speid, (*Ardovie,*) 21st Feb. 1837, F. C., 15 D. B. M. 618.

(*q*) Dick, (*Prestonfield,*) 14th Jan. 1812, F. C.; Barclay, (*Blairadam,*) 18th May 1821, Bar. Hume 837, 1 S. Ap. 24; Lang, (*Overton*) 23d Nov. 1838, 1 N. S. 98, as reversed 16th Aug. 1839, 1 M'L. and R. 871; Sinclair, (*Ulbster,*) 26th Feb. 1841, 3 N. S. 636.

(*r*) Hay (*Rannes,*) 20th Dec. 1842, 5 N. S. 347.

(*s*) Elibank as in (*h*); Lumsden, (*Auchindore,*) 26th Nov. 1840, 3 N. S. 136, affirmed, 18th Aug. 1843, 2 Bell 104; Adam, (*Finzean,*) 18th June 1840, 2 N. S. 1162, affirmed, 5th Sept. 1844, 3 Bell 342; Lockhart, (*Castlehill,*) 20th May 1841, 3 N. S. 904; E. of Buchan, (*Dryburgh,*) 23d June 1842, 4 N. S. 1435; Murray as in (*m*); Knight, (*Jordanstone,*) 1st Dec. 1842, 5 N. S. 221; Preston, (*Valleyfield,*) 28th Jan. 1845, 7 N. S. 305.

(*t*) Renton, (*Pointzfield,*) 19th July 1843, 5 N. S. 1419.

(*u*) Dick as in (*q*); Graham, (*Balgowan,*) 21st Jan. 1848, 10 N. S. 380, (under appeal.)

56. EFFECTS OF CONTRAVENTION. 1. *Contravener forfeits for himself only.*—(1.) In the ordinary form of the irritant and resolutive clauses, the forfeiting terms are limited in their application to the contravener only, by the words, *shall for him or herself only forfeit, amit, and lose all right,* &c. Such express restriction does not, however, appear to have been necessary. The penal consequences of an act of contravention are confined to the contravener, unless it is otherwise expressed (*a*); and any other rule would be inconvenient, for it is manifest that an heir in the obnoxious line could have no interest to complain of acts of contravention. These might, in numerous instances, thus pass unnoticed, and obtain effect by prescription. (2.) The penal consequences of an act of contravention are purged by the extinction or expiry of the right granted contrary to the prohibitions (*b*); and it has uniformly been assumed that they cannot be enforced after the death of the contravener, even where the forfeiture is directed against the heirs of tailzie *and their descendants* (*c*).

2. *Deeds prohibited must be reduced.*—(1.) Deeds executed in contravention of the tailzie are not in themselves invalid: they flow from a feudal proprietor, and being exceptionable by force alone of the statute, are effectual until reduced (*d*). (2.) The statute gives a title to substitutes in entails which contain irritant and resolutive

clauses, both to challenge acts and deeds done in contravention of the tailzie, and to resolve the right of the contravener; but it is by no means essential to the exercise of such right of challenge, that an action of declarator of irritancy shall likewise be brought against the contravener. The notion of the common law, that whilst the right of the heir in possession subsisted, his deeds must receive effect, seems no longer to be received. It is enough under the statute, that power is given to deprive him of the estate; but such power is vested in the substitutes of entail alone, who may or may not choose to enforce it. Their title to reduce the deeds themselves is a separate right, and operates against the users of those deeds, to whom it is *jus tertii* to maintain that the right of the contravener still subsists. The reduction of a forbidden deed may be pursued even after the death of the contravener, but declarator to the penal effect of forfeiture of the right of his descendants is incompetent (*e*). (3.) It has been successfully maintained, that where the entail contains a declaration that the contravener shall forfeit for himself and his descendants, an heir descended from the body of a contravener is barred from objecting to an act of contravention (*f*); and although, in another case, a different view prevailed, the action was pursued with the concurrence of a substitute not in the line of descendants (*g*). These instances serve to shew the propriety of the descendants of the contravener being saved from the consequences of his forfeiture, and having thus an interest to complain of acts of contravention. (4.) Decree of declarator of an irritancy must precede the reduction of the title of the contravener (*h*).

3. *Purging of irritancies.*—It is worthy of the consideration of the conveyancer in preparing a deed of entail, whether the latitude to be extended to the members of tailzie, in purging irritancies, ought not to be distinctly defined. Under these clauses, as they are usually expressed, the rule seems to be, that an act of contravention may be purged at any period during the lifetime of the

contravener, if no damage has been done to the estate; and, accordingly, an heir of tailzie disregarding the condition to bear the name and arms of the entailer, has been allowed to resume them even after process of declarator (*i*). But after the death of an heir contravening the prohibition against alienation, by granting leases of an unusual endurance, purgation has been refused to the tenants (*k*). In these circumstances, it may be advisable to declare either that purgation is wholly excluded, or shall be inadmissible unless made within a fixed period after the act of contravention.

(*a*) Ivory's Ersk. 3. 8. 31; See Gordon, 14th Nov. 1749, M. 15,384; Bontine, 2d March 1837, F. C., 15 D. 711.

(*b*) Opinion in Mackay, 23d Nov. 1798, M. 11,171.

(*c*) See Mackay, as in (*b*); Turner, 17th Nov. 1807, M. App. *Tailzie*, No. 16; affirmed, 1 Dow, 423; Mordaunt *v.* Innes, 9th March 1819, F. C.

(*d*) Agnew, 23d June 1813, F. C.; Sandford on Entails, 439, *et seq.*

(*e*) Mordaunt *v.* Innes, as in (*c*), and 5th July 1822, S. (Ap.) 1. 169, and cases cited; Maxwell, 15th Dec. 1843, 6 N. S. 253. See opinion of Lord President Boyle.

(*f*) Gordon, as in (*a*); Gilmour, 6th March 1801, M. App. *Tailzie*, No. 9.

(*g*) Turner, as in (*c*.)

(*h*) Bontine, 15th Jan. 1823, 2 S. 106.

(*i*) Hamilton Gordon, 23d July 1748, M. 2336 and 7281; Ross, 18th Nov. 1766, M. 7289, B. S. 5. 932. See Abernethie, 20th June 1837, F. C., 15 D. 1167.

(*k*) Queensberry Exec. 6th July 1820, F. C.; affirmed, 2d July 1821, S. (Ap.) 1. 59; E. of Wemyss, 2d Feb. 1821, F. C.; Hislop, 2d July 1821, S. (Ap.) 1. 64.

57. PROVISIONS (*a*).—The destination, conditions, prohibitions and irritancies, when properly expressed, were, before the Act of 1848, effectual to constitute a valid tailzie, to endure if heirs-portioners were excluded, and there were no causes of decay external to the deed, so long as the series of heirs continued to exist; and their effect still continues, subject only to the operation of the powers of disentail &c., conferred by that statute. It is necessary, however, to provide for the contingencies which attach to the right; and the provisions which are introduced for that purpose,

being proper conditions of the right of succession, each member in possession is bound to implement them under the penalty of forfeiture.

(*a*) For the provisions usually inserted in entails, see Appendix.

58. PROVISION AS TO THE MODE OF SUCCESSION ON CONTRAVENTION (*a*).—(1.) The heir next in the order of succession, or if he shall unnecessarily delay to exact the forfeiture, any substitute however remote, may complain of an act of contravention (*b*). This right flows necessarily from the status which the substitutes hold as creditors of the heir in possession to the effect of enforcing implement of the obligations of the entail, and the manifest interest which each has to throw the contravener out of the line of succession. (2.) But as irritancies, more especially those introduced by statute, are to be strictly interpreted, it has been held that the contravener forfeits only for himself, and not also for the heirs of his body (*c*). Nevertheless it is usually in express terms declared, that the heir of the contravener's body shall succeed upon a declaration of contravention, and provided that he shall take up the succession on his coming into existence, even although the person who was the nearest heir at the time of the contravention shall already have assumed possession.

(*a*) See Appendix.

(*b*) Simson, 6th Jan. 1697, M. 15,353; Irvine, Jan. 1723, M. 15,369; Dundas, 29th Nov. 1774, M. 15,430.

(*c*) Gordon, 14th Nov. 1749, M. 15,384; note (*a*) § 56.

59. PROVISION AS TO DEBTS AND ADJUDICATIONS (*a*).—(1.) When the entailer dies leaving debts, the institute or disponee takes the estate under burden of the debts; but an heir of entail making up a title as such, although he does not take the benefit of an inventory, incurs no universal representation of the entailer (*b*). (2.) It has been customary for the member in possession who wishes to disburden the estate of those debts, to apply for

the authority of Parliament to sell a portion of the lands, but he may avail himself of the provisions of the statutes (*c*); yet it appears to have, at an early period, been held that a prohibition *to sell, anailzie, wadset or dispone*, did not disable the member in possession from selling for payment of the debts of the entailer (*d*). (3.) An heir of tailzie on coming into possession, is not bound, without a condition to that effect, to discharge the debts out of his separate funds, and to transmit the estate unincumbered to his successors. He may constitute them if personal, as real burdens on the estate, by adjudication deduced in name of a trustee (*e*), or keep up the debts against the estate and the succeeding heirs by means of *assignations* from the creditors (*f*). (4.) Debts incurred under a power in the entail not restricted so as to affect merely the rents, are in the same position as entailer's debts (*g*); as are likewise arrears of interest which have accrued since the entail became effectual, on debts incurred prior to that period (*h*) (see above, § 53). (5.) When the debts are vested in a stranger, the member in possession must keep down interest or annuities, and he has no claim of relief against future heirs; but in so far as not discharged by him, such interest and annuities remain a burden on the lands (*i*). (6.) It is thus obviously for the safety of the tailzie to take the institute and substitutes bound by an express provision to discharge the entailer's debts, and purge adjudications led against the estate, a provision which will secure the extinction of the debts if actually paid by the member in possession, or on his neglect, the devolution of the estate to the next heir willing to implement it. Where the entailer is owing considerable debts, the safest mode of providing for their payment is a trust constituted with reference to the entail.

(*a*) Jurid. Styles, i. 233.

(*b*) Bell's Princ. 1743; Sutherland, 26th Feb. 1801, M. App. *Tailzie*, No. 8. See Maitland, 5th Dec. 1755, 5 B. S. 837; Murray, July 1748, 5 B. S. 764.

(c) See above as to sale for entailer's debts, § 45. 6.
(d) E. of Lauderdale, Feb. 1730, M. 15,556.
(e) Murray as in (b).
(f) See Ker, 15th Feb. 1758, M. 15,551; Lawrie, 7th Dec. 1830, 9 S. 147.
(g) Howden, 17th June 1834, 12 S. 734; affirmed, 14th May 1835, 1 S. and M'L. 739, D.; Duchess D. of Richmond, 2d Dec. 1837, 16 D. B. M. 172.
(h) Campbell, 29th Nov. 1815, F. C.
(i) Gordon, 1st Dec. 1757, M. 11,161; Campbell, as above; Erskine, 7th July 1829, F. C., 7 S. 844; Sands, 7th July 1835, F. C., 13 S. 1040; Howden and D. of Richmond, as above.

60. PROVISION FOR THE EXCLUSION OF A CONTRAVENER (a).—It is usual to provide by an express clause, that a person against whom an act of contravention has been declared, shall be excluded from the management of the estate even as administrator-in law for his own child, lest, under colour of such management, he should continue his possession.

(a) Jurid. Styles, 1. 235.

61. PROVISION FOR COMPLETING TITLES (a).—(1.) In order to preserve the estate subject to the fetters of the tailzie, it is essential not only that the deed shall have been once feudalised and recorded, but that each and every heir shall complete a title under it (b). That this may be done, a provision is introduced which confers authority on the future heirs to enforce the obligation against the member in possession (c). The tailzie runs a double risk on the succession of an heir. He may complete a fee-simple title to the lands, and if none has been made up under the entail, his possession will be ascribed to such fee-simple title, and the fetters of the entail worked off by prescription (d); or in renewing the investiture he may omit all or part of the restraining clauses, or fail in making due reference to them under a recent Act, and thus subject the estate to the diligence of creditors; or under a power to execute a new entail, such may be made, but left unregistered, and the investiture follow-

ing upon it will by prescription become the ruling title (*e*). For these reasons, it may, in particular circumstances, be expedient for future heirs to watch the proceedings of the heir in possession. (2.) In completing the title of a heir, the statute of 1685 required that the *provisions and irritant clauses* should be repeated in the rights and conveyances whereby he shall brook and enjoy the tailzied estate, and it was never doubted that these were comprehensive terms applicable to the whole clauses proper to the strict entail. Rights and conveyances, in the sense of the act, included all deeds and writs forming part of the heir's title, and therefore embraced precepts and instruments of sasine; but it was questioned if the retour of a general service fell within the scope of the act, since it was a mere link connecting the heir with unexecuted feudal clauses to which his predecessor had right. The Court determined that an heir omitting to insert the irritancies in the retour of his general service, had committed an act of contravention; but the decision was reversed on appeal, and practice has been in accordance with the opinion of the court of review (*f*). (3.) A trust-conveyance for the purpose of trying the validity of the entail in name of a trustee, did not infer contravention, provided the clauses were inserted in the reconveyance (*g*). (4.) The retour of a special service, as the immediate warrant on which a precept for infeftment was granted, must have contained the clauses of the entail; and it may be broadly stated, that whether an heir entered by the forms proper to that character; or as disponee under a conveyance from a prior member of tailzie; or in virtue of a service under a decree of declarator of contravention; or under an adjudication in implement of a decree obtained to enforce a clause of devolution; or by adjudication on a trust-bond and reconveyance by the trustee, he must have inserted the clauses in his titles (*h*). (5.) By the Transference of Lands Act, the actual insertion of the conditions, &c., is dispensed with, and it is pro-

vided that it shall be lawful and competent in dispositions and conveyances of entailed lands, and in the procuratories, charters, precepts of clare constat, decrees of adjudication, instruments of sasine, and all other deeds and instruments of what nature soever necessary to transmit, renew or complete a title under the entail, to omit the full insertion of the conditions and provisions, and prohibitory, irritant and resolutive clauses of the entail, provided they shall be in such dispositions, &c., specially referred to as set forth at full length in the recorded deed of entail, if recorded in the Register of Tailzies, or as set forth at full length in any recorded instrument of sasine forming part of the progress of title-deeds under the entail. The mode of reference is prescribed in one of the schedules of the Act; and it is declared that the reference shall be equivalent to the full insertion of the clauses, and have in questions whether with the heirs of entail or third parties, the same legal effect as as if they were inserted exactly as expressed in the recorded deed or instrument referred to (*i*). The provision plainly applies to an instrument of sasine passing on the deed of entail itself after it has been recorded in the Register of Tailzies, as being an instrument used in completing a title under the deed. A similar provision as to petitions and decrees of service is contained in another act (*k*). (6.) The insertion of a reference to the irritant and resolutive clauses applies only to the title-deeds of an estate held under an existing entail. In title-deeds following on future entails, the corresponding reference will be to the clause authorising registration in the Register of Tailzies (*l*). (7.) It will be observed that neither the conditions to feudalise and record the deed of entail, and insert the destination, &c., in the title-deeds, nor this provision that each heir on his succession shall complete a title under the entail, will be of the slightest avail against creditors or other *bona fide* singular successors, unless duly obeyed. The statute, in express words, saves their rights (*m*). It is plain, however, that the omission of

a part of the destination in the title-deeds of an heir, although operating as an act of contravention so as to ground a declarator of forfeiture at the instance of a future heir, will not benefit singular successors, unless it shall be made to appear that the line of succession is exhausted. The insertion of the destination is not required by the statute. But were the member in possession to be described as the last substitute, it would seem to follow that the legal rights of creditors or *bona fide* disponees acting on the faith of the records could not be controlled by the *jus crediti* of a future heir, which would probably be limited to process against the contravener, in so far as the estate had not been conveyed or affected. (8.) Questions upon the statutory formality of title-deeds affect only the heirs of tailzie; and so long as there exists, in a feudal sense, a valid title which has not been challenged by a substitute of entail, not only are singular successors safe, but the rights of vassals taking an entry from a contravener unaffected by the acts which he has committed in violation of the tailzie. To hold that parties possessing on subaltern rights under an entailed superiority, were bound to look beyond the mere feudal sufficiency of the title actually standing in the person of the existing superior, and to judge of the effect of statutory penalties, would be to impose an intolerable burden on vassals applying for a renewal of their investitures (*n*). (9.) In referring to the original entail, care ought to be taken to do so with strict accuracy (*o*).

(*a*) Jurid. Styles, 1. 235.

(*b*) 1685, c. 22, above, p. 5.

(*c*) This seems to be competent without an express provision. See Maule, 1st March 1782, M. 10,963.

(*d*) Ersk. 3. 7. 6; Bell's Pr. 2019-20, and cases cit.; E. of Eglinton, 22d Jan. 1842, 4 N. S. 425; Macdonald, 22d Dec. 1842, 5 N. S. 372; Campbell, 26th Jan. 1848, 10 N. S. 461.

(*e*) Stewart, 23d May 1844, 6 N. S. 1073.

(*f*) Ersk. 3. 8. 30; Stewart, 1st Feb. 1726, M. 7275, as reversed on ap., 1 Cr. and St. 233.

(*g*) Maclauchlan, 27th Jan. 1768, M. 15,421.
(*h*) Henderson, 12th Nov. 1796, M. 15,442; Craigie, (Roxburghe entail,) 19th Jan. 1808, M. App. *Adjud.* No. 16; Maclauchlan, as above.
(*i*) 10 and 11 Vict. c. 48, § 4.
(*k*) 10 and 11 Vict. c. 47, § 5.
(*l*) 11 and 12 Vict. c. 36, § 39.
(*m*) 1685, c. 22; above, p. 5.
(*n*) Gibson-Craig, 10th July 1838, 16 D. B. M. 1332.
(*o*) See Lockhart, 20th May 1841, 3 N. S. 904.

62. OBLIGATION TO INFEFT (*a*).— The entailer here binds himself, in ordinary form, to infeft the institute (whether the entailer himself or another) and the heirs of tailzie named and described in the dispositive clause, under a similar reference to the conditions, &c.

(*a*) And I OBLIGE myself to infeft myself and the heirs-male of my body whom failing the other heirs of tailzie above mentioned with and under the conditions provisions prohibitions and reservations before specified, to be holden *a me vel de me.*

63. PROCURATORY OF RESIGNATION (*a*).—(1.) In this clause the destination was usually, although, as regards the validity of the tailzie, not necessarily repeated (*b*). The restraining clauses of the deed likewise were annexed to the procuratory, as burdening the resignation of the fee into the hands of the superior. The practice, in this respect, seems to have originated in the old feudal rule, that the consent of the superior was essential both to the constitution and the alteration of a tailzie, and that a new charter upon the vassal's resignation was the most direct mode of evidencing that consent (*c*). (2.) The technical form of the clause has been so altered by a late Act, as to make it inconvenient and incongruous to follow the old rule as to the destination, &c. (*d*).

(*a*) And I RESIGN the said lands and others for new infeftment, BUT ALWAYS with and under the conditions prohibitions provisions declarations and reservations above written.
(*b*) Murray Kynnymound, 5th July 1744, M. 15,380.
(*c*) Craig, 2. 17. 20-1.
(*d*) 10 and 11 Vict. c. 48, § 1, and Schedule (*A*).

64. ASSIGNATION TO THE TITLE-DEEDS AND RENTS.—These clauses do not call for special notice. See *App.*

65. OBLIGATION TO RELIEVE THE HEIRS OF DEBTS (*a*).—The entailer sometimes binds himself and his representatives to relieve the heirs of entail of the debts that may affect the estate, which thus become a burden upon his executry or separate estate, and the members of tailzie have a right to see that such separate estate shall be applied to their relief (*b*).

(*a*) Jurid. Styles, 1. 236.
(*b*) Stewart *v.* Denham, 7th Feb. 1735, Elch. *Tailzie*, 3.

66. CLAUSES OF REVOCATION AND DISPENSATION (*a*).—(1.) In order to fulfil the feudal rule, that a conveyance of heritage must be *de præsenti*, the deed of entail is, in form, an absolute disposition of the lands, to take immediate effect, and the delivery of the deed is dispensed with; but, if the conveyance is not to the maker as institute, but *mortis causa*, he reserves his liferent right and power to alter, which control the absolute *de præsenti* grant. (2.) This power of alteration and revocation need not of course be formally exercised so long as the deed remains in the custody, and under the power of the entailer: the deed may be cancelled or destroyed (*b*). But if it has been recorded or put beyond his control by delivery to a party interested, or one acting for him, a revocation by deed is necessary. A deed of revocation of an entail which has not been feudalised, is effectual if it duly express the will of the maker to alter his intention (*c*); but if infeftment has followed, it is necessary that the investiture thus completed be altered by a valid conveyance to the heir-at-law or a new series of heirs of provision, or at least, that an obligation be duly and formally imposed on the heirs under the investiture so completed, to reconvey the lands. Such obligation will enable the heir-at-law, or the disponee in the new conveyance, to effect a change of the in-

vestiture by adjudication in implement (*d*). (3.) But if no power of revocation has been reserved, it is incompetent for the entailer, as liferenter, and the institute, as fiar, by a joint deed, to alter or revoke a feudalised entail to the prejudice of the substitutes (*e*). Where, however, an entail, although registered, continued personal, it was held to be revocable by the maker without the consent of the favoured parties, the deed being gratuitous, and in favour of heirs *nascituri*; but in a later case, an entail contained in a contract of marriage was held not to be revocable by the granter, as regarded even a gratuitous disponee, there being an obligation not to alter (*f*).

(*a*) Jurid. Styles, 1. 241.

(*b*) See Burnet, 9th Dec. 1701, M. 15,566.

(*c*) See Logan, 13th Dec. 1797, M. 11,379.

(*d*) See Porterfield, 15th May 1821, F. C., 1 S. 9; remitted, 2 W. S. 369; adhered to, 13th Nov. 1829, F. C., and (18th Nov.) 8 S. 16, affirmed, 5 W. S.

(*e*) Gordon, 25th Jan. and 2d Aug. 1771, M. 15,579; affirmed, Swinton, p. 48. The authority of the prior case of E. Moray, 25th Jan. 1744, Elch. *v. Tailzie*, 22 B. S., 5. 734, disregarded.

(*f*) Scott, 23d June 1713, M. 15,569; Shaw, 15th July 1715, M. 15,572; See More's Notes on Stair, cxci.

67. PROCURATORY FOR RECORDING (*a*).—1. *Mode of registration.*—(1.) The Court of Session are required by the statute of 1685 to interpone their authority to the original deed of entail when produced judicially, and a register-book is appointed to be kept, "wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam*" (*b*). (2.) Although the statute, in express words, provides that the *original tailzie* shall be produced judicially, it is remarkable that in the first application made for the authority of the Court to the re-

gistration of the terms of an entail, warrant should have been granted to record not the deed itself, which was in the form of a procuratory of resignation, but the charter following upon it (*a*.) The objection of undue registration of that entail was, at the distance of nearly a century, sustained on the authority of the judgment in a prior case. But a charter may by statutory direction take the place of an original tailzie (*d*). (3.) The statute is retrospective (a view which was not at first taken by the Court,) and that even where the deed was feudalised prior to the Act (*e*). (4.) The terms of the statute sanction the view, that the Legislature contemplated the insertion in the register of a mere abstract from the original deed. But in practice the full tenor is recorded, and the Court have refused to authorise the exclusion even of part of the lands which had been sold by the entailer (*f*). (5.) The necessity of registration of the entail itself is not superseded by the registration of a sasine upon the deed, or on a charter following upon it. (6.) The *Rutherfurd Act* makes the procuratory for recording, a clause of the greatest importance to the deed of entail in its new form, by enacting, that in tailzies dated on or after 1st August 1848 which contain an express clause authorising registration in the Register of Tailzies, it shall not be necessary to insert any irritant or resolutive clauses in order to render the entail effectual under the statute of 1685. And it is provided that the clause shall have the full operation and effect of the most formal irritant and resolutive clauses duly applied to every prohibition, condition, restriction and limitation of the deed, except such only as by its terms may be specially excepted; and farther, that the clause shall be engrossed as part of the deed in the Register of Tailzies when recorded in that Register, and shall be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts and instruments of sasine following on the entail, in the manner now required in regard to irritant and resolutive clauses (*g*).

2. *Who may apply for registration.*—(1.) It was at an early period maintained that a substitute heir had no title to apply directly to the Court for authority to have the deed recorded, and that the only competent remedy was by action against the member in possession, to compel him to produce the deed judicially. This circuitous course of enforcing a measure essential to the completion of a right in which all the substitutes have an interest appears, indeed, to have in one instance been sanctioned by the Court (*h*); but it has since been abandoned; and although the entailer or the institute is the proper party to produce the deed for registration, it is now held that any substitute, however remote, may obtain the authority of the Court, if he can produce the deed (*i*), or force it from the party possessor by incident diligence, which will be granted for that purpose (*k*). But an heir-female cannot apply without the concurrence of her husband, or of a tutor *ad litem*, even where the *jus mariti* and right of administration in regard to the estate are excluded (*l*). If the deed shall have been recorded in any other register, warrant will be obtained for its transmission to the process (*m*). (2.) It has been questioned if an heir whomsoever has a title to apply for registration (*n*). (3.) As entails are usually in the form of a *mortis causa* conveyance, the statute would in most cases be inoperative, unless registration were admitted as well after as before the death of the entailer, and this has uniformly been sanctioned (*o*). (4.) The form of the application is by summary petition(*p*).

(*a*) AND I grant full power and authority to as my procurators, or to any one of the heirs of tailzie, foresaid, to cause present this deed of entail before the Lords of Council and Session judicially, and procure the same recorded in the Register of Tailzies, and to expede charters and infeftments thereon agreeably thereto and in terms of law, and that at the expense of the heir of tailzie in possession for the time.

(*b*) 1685, c. 22, see p. 5.

(*c*) See Irvine, below.

(*d*) Irvine, 26th June 1776, M. 15,617, and App. *v. Tailzie*, No. 1, af-

firmed, 16th April 1777, on authority of Kinnaird, 26th Nov. 1761, M. 15,611, affirmed, 18th Feb. 1765; Stirling, 28th May 1845, 7 N. S. 640.

(*e*) Craig's Creditors in H. of Lords, 3d July 1714, Robertson's Appeal Cases, 110; Philp *v.* E. Rothes, 14th Dec. 1758, M. 15,609, B. S. 5, 865-869, affirmed; Kinnaird, as above; E. of Rosebery, 22d June 1765, M. 15,616; Irvine, as above; Stirling, 28th May 1845, 7 N. S. 640.

(*f*) Moore, 28th Nov. 1821, F. C., 1 S. 173.

(*g*) 11 and 12 Vict. c. 36, § 39.

(*h*) Drummond, noticed in Nairne, below.

(*i*) Ersk. 3. 8. 26; Bell's Princ. 1742; Nairne, 10th March 1757, M. 15,605; B. S. 5. 335; see Reid, 25th Feb. 1710, B. S. 4. 794; Napier, 20th July 1762, B. S. 5. 888; Gordon, 11th Jan. 1704, M. 5787.

(*k*) Ker, 7th July 1804, M. 14,984.

(*l*) Hamilton, 11th March 1777, B. S. 5. 625.

(*m*) Campbell, 14th Nov. 1748; Elch. *v. Tailzie*, 35.

(*n*) Jessop, 7th Feb. 1822, 1 S. 273; Bell, as in (*i*).

(*o*) See cases, note (*i*), above.

(*p*) Ersk. as above; Ker, as above; Bell's Princ. 1742; Jurid. Styles, 3. 907.

68. PRECEPT OF SASINE.—This clause may contain a mere reference to the conditions, prohibitions, and forfeiting clauses, if they are duly expressed in a prior clause.

69. INFEFTMENT (*a*).—(1.) The sasine upon the deed of entail, when prepared before the registration of the entail, contains the whole conditions, provisions and prohibitions; and likewise the irritant and resolutive clauses, in all cases where the entail contains those clauses; and in the case of a *future* entail which does not contain irritant and resolutive clauses, the clause of registration in the Register of Tailzies. The destination is likewise inserted in terms of a condition noticed at § 17, in order that it may appear in the register, and not for the purpose of giving a real or feudal right to the heirs or substitutes of entail, which is incompetent to more than one sole proprietor or fiar at one and the same time. Those clauses are introduced into the narrative of the warrant of infeftment, and referred to in the narrative of the delivery of sasine (*b*). (2.) When the entail has, prior to infeftment, been recorded in the Register of Entails, a reference to all the clauses except the destination is sufficient (*c*.) The latter must be in-

serted at length, in the sasine on the entail, and as respects the parts including and subsequent to the name or position of the heir taking infeftment, in all future sasines. In regard to effect, it will be observed, that as a step in the feudal title, the sasine will be valid although the whole restraining clauses of the entail are omitted. The omission of a part of the destination subsequent to the name or description of the heir in possession, or of the conditions, prohibitions, irritant or resolutive clauses, or provisions of the deed, or a competent reference to the latter, although operating as an act of contravention, will not annul the sasine; and although the right of the contravener will be forfeited in as far as the estate has not been alienated or evicted, the statute protects the interests of creditors and purchasers contracting *bona fide* with him (*d*). Future heirs have thus a manifest interest to see that proper titles are made up under the entail. Frauds against the substitutes have been attempted, but there is little risk of their occurring in modern practice.

(*a*) See the *Feudal Conveyancing* and *Supplement.*
(*b*) Supplement to Feud. Conv., p. 177.
(*c*) 10 and 11 Vict. c. 48, § 4; 11 and 12 Vict. c. 36, § 39.
(*d*) See the statute of 1685, above, p. 5.

70. ENTRY WITH THE SUPERIOR.—In completing a public right under a deed of entail, the institute or first person taking up the succession, will enter according to the state of the title; and, in a feudal respect, the procedure does not call for particular remark. (See the *Feudal Conveyancing.*) It will be observed that charters are among the deeds enumerated in the statute, and that the acceptance of a charter from the superior which does not contain the whole of that branch of the destination including and following the name or description of the member of tailzie in whose favour the charter is conceived, as well as the conditions, provisions and prohibitions of the entail or a competent reference to them, and likewise the irritant and resolutive clauses in the case of an entail which contains

those clauses, and in the case of a *future* entail not containing irritant and resolutive clauses, the procuratory for registration in the Register of Tailzies, or a competent reference to them, will infer an act of contravention on the part of the institute or heir of tailzie.

71. FUTURE ENTAILS.—1. *Power of disentail.*—(1.) The proprietor in possession of an estate entailed by a deed executed on or after the 1st August 1848, has powers of a less extensive nature than those given to the proprietor of an estate held under a prior entail. If born after the date of the tailzie and of full age, the former may disentail the estate under the authority of the Court by means of a recorded instrument of disentail; or if born before the date of the tailzie he may, when of full age, disentail the estate under the same authority, with the consent of the heir next in succession being his heir apparent under the entail, and twenty-five years of age, not subject to any legal incapacity, and born after the date of the tailzie (*a*). (2.) Reference is made to § 48, as to the powers of disentailing vested in the heirs in possession under existing tailzies.

2. *Excambion.*—The statutory powers of the heir in possession under a future entail are limited to those contained in the Rosebery Act, with the privilege of using the judicial forms introduced by the Rutherfurd Act, (above, § 41.)

3. *Feus.*—(1.) The heir in possession has no general powers of feuing, except under the Rutherfurd Act and with the same consents as are necessary for disentailing the estate, (above, § 46. 2.) (2.) He possesses special power to feu ground for the sites of places of christian worship, schools, &c. (above, § 46. 1.)

4. *Leases.*—He has no general powers of leasing beyond those contained in the Rosebery Act, except with the same consents as are necessary for disentailing the estate, (above, § 33.) (2.) He possesses special powers for the purposes mentioned in last Art., (above § 32.)

5. *Improvements and Family Provisions.* — His powers as to these, without consents, are limited by the tailzie under which he holds the estate, the Montgomery and Aberdeen Acts being inapplicable to future entails.

6. *Irritant and Resolutive Clauses unnecessary.*— The procuratory or warrant in the deed of entail authorising the deed to be recorded in the Register of Tailzies, implies the most perfect irritant and resolutive declarations in protection of all the prohibitions in the entail which are not specially excepted from their effect (*b*).

7. *Trust funds and lands appointed to be entailed.* (See above, § 45. 6, 50. 2, 3.)

8. *Conventional Powers.*—(1.) The importance of giving full and ample powers in future entails, in reference to feus, leases, improvements, family provisions &c. is thus manifest. For without these, as entails during the period of their existence, which may average above thirty years, will be greatly more strict than those which have produced the late important change in the law, the powers of the heir in possession will be of a very limited nature as respects the improvement of the estate, and provisions for the members of his family after his death. It is plain, moreover, that nothing can tend to perpetuate an estate in one family more than giving ample powers in reference to matters of so essential moment, the absence of which must necessarily induce the earliest exercise of the statutory powers of disentail competent to the heir in possession. Clauses of a just and liberal nature are therefore of great importance. (2.) In reference to those suggested in the form of the future entail, it may be observed that it seems in no small degree expedient to get rid of the frequently occurring questions, in connection with a power to burden the estate or the substitute heirs with a certain number of *years' rents* of the estate, and to insert a faculty in favour of the substitutes to charge the estate with a fixed capital sum for improvements and childrens' provisions, proportioned to the value of the estate, a limit being ex-

pressed beyond which it shall not be liable to be burdened. By this means if, on the one hand, there will be a risk of an increasing burden on the lands up to a certain point, the means will exist for discharging it by a partial sale, in the same manner as if the estate were held in fee-simple, —an arrangement consistent at the same time with the progress of improvement, and preferable to a renewal of the attempt, by means of statutes of the nature of those now repealed, to protect the fee of entailed estates from the obligations and acts of the successive heirs, to the accumulation of intolerable burdens on them; or to the still more hopeless effort to maintain entails even under the new system, without any powers in the deed to burden the estate for necessary improvements and family provisions, in the vain expectation that heirs of entail will, in general, discharge their obligations to the public and their families out of the yearly rents of the estate.

(*a*) 11 and 12 Vict., c. 36, § 1.
(*b*) The Act, § 89.

ADDENDA IN RELATION TO THE ACT OF 1848.—1. *Contents of Affidavit as to Entailer's debts*, &c. The provision for the disclosure of entailer's debts and other debts, in applications for authority to disentail, requires that an affidavit shall be made, setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows or children, affecting or that may be made to affect the fee of the estate, or the heirs of entail. These terms appear to be comprehensive enough to include all debts affecting or which may be made to affect the fee, *the rents*, or the heirs of entail. For although the heir in possession liable to pay an improvement debt, or provisions to children, may be discharged of all personal liability on assigning a certain proportion of the free rents to meet the claim, still on his death it revives as a debt against the succeeding heir, and

may therefore be held to come within the fair meaning of the terms used in the clause.

2. *Bond of annualrent, and bond and disposition in security to an executor*, &c.—(1.) By section 15 of the Act of 1848, an executor or assignee may call on the heir in possession to grant bond of annualrent, it being specially provided in this case, that the heir "required to grant and granting such bond, shall be entitled to impute *towards payment of the sums thereby due*, any excess of sums which may have been paid by or recovered from him beyond the amount of annualrents due from and after the decease of the heir who shall have executed such improvements." It seems to admit of no doubt, therefore, that whatever the proportion of the debt actually paid by or recovered from the heir in possession, the amount upon which the annualrent is to be calculated is not thereby to be diminished. The advantage is to be personal to the heir, who will receive allowance from the executor or assignee of the excess, either by way of deduction from the annual rents as they fall due, or by some other proper arrangement. (2.) But the question arises under the terms of § 18, in what manner sums paid by the heir in possession are to be dealt with. The executor or assignee having power to demand a bond and disposition in security for two-thirds of the sums expended, has taken payment of or recovered a proportion of the debt from the heir, which, as respects the creditor, necessarily reduced his claim by the amount of the excess over the legal interest which became due upon it. It is probable that his right to demand bond for the balance remaining due, would be comprehended within the power given to demand bond for the whole when the whole statutory amount continues unpaid. But as respects the heir in possession, there is no power given, as in the separate case of a bond of annualrent, to impute the excess so as to relieve him personally, and it seems to be beyond the fair reading of the two statutes to supply the proviso by implication; for, by the Mont-

gomery Act, an heir in the position supposed makes payment of an improvement debt without relief, unless he pays more than one third of the rents coming to his use; and thus, upon payment, the claim is absolutely extinguished as respects the rents and the future heirs; or if a claim of relief exists, it can only be enforced under the Montgomery Act. It seems impossible, therefore, in the absence of express words in reference to the case provided for in § 18, that the heir, in concurrence with the executor or assignee, can charge the estate with any part of the claim which has been already paid.

3. *Inhibition by a creditor.*—It is to be noted that the privilege of using inhibition under § 7, is competent to those creditors only whose debts affect or may be made to affect the fee of the estate. Much caution, therefore, is necessary on the part of those holding claims which only attach to the rents, or affect the heirs of entail, with respect to proceedings by the heir in possession for authority to disentail or sell the estate, &c., in the view of appearing in the process as permitted by § 6.

4. *Respondents in applications to the Court.*—There is no limitation to a particular class or number of heirs, of the parties to be called in petitions to the Court, except where there are heirs in existence with whose consents the estate may be disentailed, and in applications for authority to grant feus or long leases under § 24 (*a*). Consequently, in all other cases than those to which the exceptions relate, the whole heirs of entail must be called as in an ordinary action.

(*a*) The Act, § 33, 34, 36.

APPENDIX.

10TH OF GEORGE III.

CAP. LI.

An Act to encourage the Improvement of Lands, Tenements, and Hereditaments, in that part of Great Britain, *called* Scotland, *held under Settlements of strict Entail.*

Preamble reciting an Act of the Scottish Parliament, 1685.
Proprietors of entailed estates may grant tacks for fourteen years, and one existing life; or for two lives, and life of survivor; or for thirty-one years.

WHEREAS by an Act of the Parliament of Scotland, made in the year one thousand six hundred and eighty-five, intituled, *Act concerning Taillies*, all his Majesty's subjects are impowered to taillie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolute clauses as to them shall seem proper; and which taillies, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever: And whereas many taillies of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tickets or leases of a longer endurance than their own lives, or for a small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public; and which must daily

Note.—The words "And be it enacted," or other introductory words, are implied at the commencement of each section.

increase, so long as the law allowing such entails subsists, if some remedy be not provided: Wherefore, to prevent a mischief and inconveniency so hurtful to the public, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful to every proprietor of an entailed estate within that part of Great Britain called Scotland, to grant tacks or leases of all or any part or parts thereof, for any number of years not exceeding fourteen years from the term of Whitsunday next after the date thereof, and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof; or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them; or for any number of years, not exceeding thirty-one years from the term aforesaid.

Specification of terms in which lands so leased are to be inclosed.

II. That every such lease for two lives shall contain a clause obliging the tenant or tenants to fence and inclose, in a sufficient and lasting manner, all the lands so leased within the space of thirty years, and two third parts thereof within the space of twenty years, and one third part thereof within the space of ten years, if the said lease shall continue for such respective terms; and that every such lease for any term of years exceeding nineteen years, shall contain a clause, obliging the tenant or tenants to fence and inclose in like manner all the lands so leased during the continuance of such term, and two third parts thereof before the expiration of two third parts of such term, and one third part thereof before the expiration of one third part of such term.

Lease for two lives, or more than nineteen years, to oblige tenant to keep fences in repair, and to leave them so at expiration. Not more than forty acres to be comprehended in one field, except where lands are improper for culture by the plough.

III. That every such lease for two lives, or for any term of years exceeding nineteen years, shall contain a clause obliging the tenant or tenants to keep and preserve the fences, when made, in good and sufficient repair during the lease, and to leave them so at the expiration thereof; and that no inclosures which shall be made, shall comprehend more than forty acres in one field; excepting where the lands consist of hills or other grounds, incapable or improper by their nature for culture by the plough; in which case, the inclosures may be made of such extent as the nature of the ground shall require.

Building leases may be granted for ninety-nine years.

IV. And whereas the building of villages and houses upon entailed estates may, in many cases, be beneficial to the public, and might often be undertaken and executed, if heirs of entail were empowered to encourage the same, by granting long leases of lands for the purpose of building; be it therefore enacted by the authority aforesaid, That it shall be, and it is hereby declared to be in the power of every proprietor of an entailed estate, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years.

But not more than five acres to one person; conditionally that one dwelling-house be built, &c. for every half acre.

V. That not more than five acres shall be granted to any one person, either in his own name, or to any other person or persons in trust for him; and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least, not under the value of ten pounds sterling, shall not be built within the space of ten years from the date of the lease, for each one half acre of ground comprehended in the lease; and that the said houses shall be kept in good, tenantable, and sufficient repair; and that the lease shall be void whenever there shall be a less number of dwelling-houses than one, of the value aforesaid, to each one half acre of ground, kept in such repair as aforesaid, standing upon the ground so leased.

Manor-place not to be leased, nor village to be built within 300 *yards thereof.*

VI. That the power of leasing hereby given shall not in any case extend to, or be understood to comprehend, a power of leasing, or setting in tack, the manor-place, office-houses, gardens, orchards, or inclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years, when the heir in possession was of lawful age; and that no lease of lands shall be granted, under the authority of this act, for the purpose of building villages or houses within three hundred yards of the manor-place usually in the natural possession of the proprietor.

Lease not to be granted for less rent than was payable for the last lease; nor till determination thereof, &c.

VII. That all leases made or to be granted under the authority of this act, shall be made or granted for a rent not under the rent payable by the last lease or sett, and without grassum fine

or foregift, or any benefit whatsoever, directly or indirectly, reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises; or that such lease, if granted for a time certain, shall be within one year of being determined; and that all leases otherwise granted shall be void and null.

Taillie containing ample powers, heir in possession may exercise the same.

VIII. That if any taillie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers, in the same manner as if this act had never been made.

Proprietor laying out money for improvement of estate, to be a creditor to succeeding heir for three-fourths thereof.

IX. And whereas it may be highly beneficial to the public, if proprietors of entailed estates were encouraged to lay out money in inclosing, planting, or draining, or in erecting farm-houses, and offices or out-buildings for the same, upon their entailed lands and heritages: And whereas such proprietors may be induced and encouraged so to do, if they, their executors and assigns, were secured in recovering a reasonable satisfaction, for the money expended in making such improvements, from the succeeding heirs of entail; be it therefore enacted by the authority aforesaid, That every proprietor of an entailed estate who lays out money in inclosing, planting, or draining, or in erecting farm-houses, and offices or out-buildings for the same, for the improvement of his lands and heritages, shall be a creditor to the succeeding heirs of entail for three-fourth parts of the money laid out in making the said improvements.

Provided the same do not exceed four years' free rent, after deduction of burdens, &c.

X. That the sum or sums of money laid out upon such improvements, by any one heir of entail during his or her possession, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail, for more than four years free rent of the said entailed estate, after deduction of all public burdens, life-rents, and interests of debts, which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

Proprietor intending to lay out money on improvements, to give notice thereof; and lodge a copy thereof with Sheriff or Steward clerk.

XI. That every proprietor of an entailed estate, who intends to lay out money on such improvements, shall, three months at least before he begins to execute the same, give notice in writing to the heir of entail next entitled to succeed to the said estate after the heirs of the body of the said proprietor, if within Great Britain or Ireland, and if the heir next entitled to succeed is not within Great Britain or Ireland, shall give notice in writing to the nearest male relation by his father of lawful age, or to his known factor or attorney, of such his intention, specifying in such notice the kind of improvement intended, and the farms or parts of the estate upon which the improvements are intended to be made; and shall lodge a copy thereof with the sheriff or steward clerk of the county wherein the lands lie.

And, laying out money with intent to become a creditor, to lodge annually with the Sheriff or Steward clerk an account of money expended, &c.

XII. That the proprietor of an entailed estate, who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail in the manner above expressed, shall annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the sheriff or steward clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported when payment shall be demanded or sued for.

Heir of entail laying out four years' free rent, subsequent heir not to lay out more.

XIII. That when a sum equal to four years free rent shall have been laid out, in manner above-mentioned, by one or more heir or heirs of entail, and shall remain a subsisting charge against the succeeding heirs; it shall not be lawful for any subsequent heir or heirs to lay out any more money under the authority of this act, for any of the improvements afore-mentioned.

Sheriff and Steward clerks to record vouchers, and make copies thereof.
Fees for the same.

XIV. That all Sheriff or steward clerks, with whom the accounts, vouchers, and copies of notice shall be lodged, shall, within the space of one month thereafter, record them in a book

to be kept for that purpose, and return them when called for; and shall make the book patent to all persons desirous to see the same; and shall give certified copies or extracts of all accounts, vouchers and copies of notice recorded, they receiving for their trouble the usual fees for recording writings and giving out extracts, and sixpence sterling from each person who shall have inspection of the book wherein the accounts, vouchers, and copies of notice shall be recorded.

Successive claims may be made for money expended, with interest. On non-payment within three months, action may be instituted against heir in possession.
Persons obtaining decree, to have preference of other creditors.

XV. That the executor or executors, assignee or assigns, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, may after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate, to pay such part thereof as is due by the authority of this Act, with the legal interest, from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not payed within three months of such requisition, it shall then be lawful for the person or persons having right, to institute an action in the Court of Session against the heir then in possession, for compelling him to pay the money and interest thereof; and upon obtaining a decree, he, she, or they, shall be at liberty to use every kind of diligence or execution, authorised by the law of Scotland in recovering payment of debts, excepting adjudication against the entailed estate improved; and in all questions of competition for the rents of the entailed estate, the person or persons who have sued for and obtained a decree under the authority of this Act, or the person or persons having right to such decree, shall be preferred to the other creditors of the heir of entail who has succeeded to the estate.

Heir sued for money due for improvements, to be discharged, on conveying to creditors one-third of clear rents, &c.

XVI. That when any heir in possession is sued for the money due on account of improvements made upon an entailed estate, under the authority of this Act, he shall be discharged in all cases from such suit, upon his assigning and effectually conveying to the creditor or creditors one third part of the clear rents of the entailed estate during his life, or until the money so due shall thereby be paid off and discharged.

Persons in the right of money due, may sue the heirs of next heir, or heir next succeeding, and, in competition, shall be preferred to personal creditors, and likewise succeeding heirs, with like preference.

XVII. And whereas it may happen that the heir of entail, who next succeeds the proprietor who expended the money in the improvement of the entailed estate may die, before the money due by him on account of improvements made upon the estate is paid, by which the person or persons in the right of the money due may be embarrassed in recovering payment: for remedy whereof, be it enacted by the authority aforesaid, that the person or persons in the right of the money due, may either sue the heirs and successors of the said next heir of entail in any other than the entailed estate, or the heir of entail next succeeding to him, or both, and use every kind of diligence or execution authorised by the law of Scotland in the recovering payment of debts against them and their estates, excepting adjudication against the entailed estate, until the money due is fully satisfied and paid; and the person or persons in the right of the money due shall, in any competition for the rents of the entailed estates, be preferred to the personal creditors of the heir of entail in possession; and the person or persons in the right of the money due, in like manner shall be entitled to sue every succeeding heir of entail, until the money is satisfied and paid; and shall have the same preference to the rents of the entailed estate, in competition with the creditors of such heirs of entail.

Relief competent to successive heirs, to the extent of one-third part of the rents.

XVIII. That the heir who next succeeds in the entailed estate to the proprietor who expended the money, under the authority of this Act, in making improvements upon the estate, and the heirs and successors of such heir, shall be bound to relieve all subsequent heirs of all or such parts of the debt, incurred by the improvement of the estate under the authority of this Act, as shall be paid by them, to the extent of one third part of the rents which have come to the use of such first succeeding heir, or to the use of his heirs or executors; and when the third part of the rents which have come to the use of the first succeeding heir, or to his heirs or executors, are exhausted, then the next succeeding heir, and his heirs and successors, shall in like manner be bound to relieve all subsequent heirs, to the extent of one third part of the rents which have come to their use; and relief shall in like manner be competent to every succeeding heir who shall pay, against the heirs and successors of the preceding heir.

Heirs of entail, &c. sued on account of improvements, shall be discharged on payment of one third of their rents.

XIX. That when the heirs and successors of an heir of entail, in any other than the entailed estate, are sued for the money due on account of improvements made upon an entailed estate under the authority of this Act, they shall be discharged in all cases from such suits, upon making payment of one third part of the rents of the entailed estate which have come to the use of such heir of entail, or to the use of his said heirs or successors.

Claimant of money expended by proprietor, to require payment, within two years after his decease, of succeeding heir; and on non-payment for six months, to institute action, &c.

XX. And whereas inconveniences and confusion might arise from the executor, assignee, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, their not timeously requiring the heir next succeeding in the estate to pay what they are entitled to receive by authority of this Act, and suing such heir to compel him to pay, if payment is not made: For remedy whereof, be it enacted by the authority aforesaid, That the executor, assignee, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, shall be obliged, within the space of two years after the death of the proprietor who expended the money, to require payment from the succeeding heir; and within the space of six months after the elapse of the said two years, to institute an action, if the money is not paid, in the Court of Session; and to proceed without delay in recovering a decree for the sum due, and doing exact diligence for recovering payment thereof, or at least to the amount of one third part of the free rents of the estate which shall have become due to such succeeding heir.

But neglecting so to do, and not recovering one third part of rents, &c. before his decease, shall cease to be creditor to subsequent heirs for such sum; and such third part to be recoverable only from executors, &c. of first heirs, &c., and surplus from subsequent succeeding heirs.

XXI. That the executor, assignee, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate, who shall neglect to require the next, or any other succeeding heir or heirs to pay, and shall allow such succeeding heir or heirs to die without recovering payment from him or them to the amount of one third part, at

least, of the rents that shall have become due to such heir or heirs, shall cease to be creditor to the subsequent succeeding heir or heirs respectively, to the extent of one third part of the rents which shall have become due to the heir or heirs so deceasing as aforesaid; and shall be entitled to recover payment of his claim to the extent of such third part of the rents, from the executors or heirs only of the first, or any other succeeding heir or heirs, in any other estate than the entailed estate; and shall be entitled to recover payment of the surplus of his claim, if any be, and no more, from the subsequent succeeding heir or heirs respectively.

Heir first succeeding, not living long enough to be indemnified for what he pays, his executors may sue succeeding heir of entail for relief, &c.

Like relief to executors of every heir who is not repaid.

XXII. And whereas it may happen that the heir, who next succeeds to the proprietor who expended money in making improvements upon an entailed estate, may pay all or part of the money due on account of such improvements, and may not live so long as to be indemnified by the third part of the rents which shall come to his use, or to the use of his heirs or executors; be it therefore enacted by the authority aforesaid, That if the heir who first succeeds in the entailed estate to the proprietor who expended the money, does pay all or part of the money due on account of the improvements made, and shall not live long enough to be indemnified of what he pays by one third part of the rents that shall come to his use, or to the use of his heirs or executors; it shall be competent to his executors or assigns to sue the succeeding heir of entail for relief of such part of the money as shall not be repaid by the third part of the rents which have come to his use, or to the use of his heirs or executors; and relief shall in like manner be competent to the executors or assigns of every heir of entail who pays more than is repaid by the third part of the rents which have come to his use, or to the use of his heirs and executors.

Money expended in making improvements, not to be made use of as a ground of debt for adjudging estates.

XXIII. That no money expended in making improvements upon an entailed estate, for which a decree shall be obtained in the Court of Session, shall be made use of as a ground of debt for adjudging the estate upon which the improvements have been made; and if any decree of adjudication shall be obtained against the entailed estate for such debts, every such decree shall and is hereby declared to be void.

Heir of entail succeeding to estate upon which improvements have been made, excluded from making claim of debt.

XXIV. That if the heir of entail who shall succeed to an entailed estate upon which improvements have been made, shall have right to a claim of debt arising from the making of such improvements as next of kin, or by the will or settlements of the heir of entail who expended the money; in every such case, the claim of debt shall and is hereby declared to be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

On judgment obtained against heir for whole debt created by improvements, defender to be liable in full costs; if otherwise, Court to award costs at discretion.

XXV. That if any heir of entail, against whom a debt is created for improvements made on the entailed estate to which he succeeds, shall refuse to pay the money required of him under the authority of this act, and that decreet shall be obtained against him for the whole of the sum or sums of money of which he shall be required to make payment; in every such case the defender shall be liable in full costs of suit; and if decree is not obtained for the full sum or sums of money of which payment has been required, it shall be in the discretion of the Court to award costs of suit to either party, as the justice of the case shall direct.

Heir of entail, after having completed improvements, may bring action of declarator, &c. and produce evidence of money laid out.

Court of Session, &c. may decree what sum shall be a charge on succeeding heirs, &c.

XXVI. And whereas questions may arise concerning the amount of the sums laid out under the authority of this act, at a great distance of time, when the material witnesses may be dead; For remedy whereof, and for ascertaining, in due time, the amount of the sums so expended; be it therefore further enacted, That it shall and may be lawful for every heir of entail, after he shall have laid out money upon the improvement of his entailed estate as aforesaid, and shall have completed the improvement of all or any particular part of such estate, to bring, if he shall think proper, an action of declarator before the Court of Session, or a process before the Sheriff, in which he shall call the heir next entitled to succeed after the heirs of his own body, and shall in such suit produce proper evidence of the money laid out in such improvements; and the said next heir, or any other heir of entail, shall be entitled to produce proper

evidence to set aside or diminish the said claim: And it shall and may be lawful for the said Court of Session, or for the said Sheriff, to pronounce a decree for such part of the said sum, as, by the true intent and meaning of this act, is intended to become a charge against the succeeding heirs in the said entailed estate; which decree, if pronounced by the Sheriff, shall become final, unless carried to the Court of Session by suspension within six months after the same shall have been pronounced; and if pronounced by the Court of Session, either in such process of declarator or suspension, shall be final, if an appeal is not brought within twelve months.

Heir of entail building mansion-house, &c. to be a creditor to succeeding heir for three fourth parts of the expense.

XXVII. And whereas it frequently happens that there are not, upon entailed estates, mansion-houses and offices suitable to the estates, and fit for the accommodation of the heirs of entail; and that mansion-houses and offices upon entailed estates are sometimes destroyed by fire, or from other accidental causes, or become insufficient by length of time; and it being beneficial to the public to encourage heirs of entail, in such cases, to build houses and offices suitable to their estates, and fit for the accommodation of their families; be it therefore enacted by the authority aforesaid, That every heir of entail who lays out money in building a mansion-house or offices, or in repairing or adding to the mansion-house or offices upon his estate, shall be a creditor to the next succeeding heir of entail for three fourth parts of the money expended by him.

But the same is not to exceed two years' rent, after burdens, &c. deducted.

XXVIII. That the sum or sums of money laid out by any one heir of entail, in the building a mansion-house or offices, or in the repairing or adding to the mansion-houses or offices, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail for more than two years' rent of the said entailed estate, after deduction of all public burdens, liferents, and interests of debts, which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

Proprietors laying out money, to give notice, and record copies thereof.

XXIX. That the proprietor of the entailed estate, who lays out the money, shall, previous thereto, give notice in writing to the heir of entail next entitled to succeed to the said estate after

the heirs of his own body; and record copies of the same, together with the accounts of the money expended, and the vouchers thereof, in the sheriff or steward court books of the county within which the mansion-houses and offices are situated, in the form and manner above directed with regard to moneys expended in making improvements upon entailed estates.

Persons having right to claim for money expended by proprietor in building mansion-house, &c. may, within a year after decease, require heir succeeding to pay the whole, with interest; and on non-payment for three months, may sue.

XXX. That the executor or executors, assignee or assignees, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate, in the building a mansion-house or offices, or in the repairing or adding to the mansion-house or offices upon his estate, may, after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate to pay the whole, or such part thereof as is due by the authority of this Act, with the legal interest from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not paid within three months of such requisition, it shall be lawful for the person or persons having right, to sue the next succeeding heir, in the manner above directed for the recovering of money expended in the improvement of entailed estates.

Rules enacted with respect to proprietors making improvements, extended to claims here mentioned.

XXXI. That the same rules of relief among succeeding heirs of entail, and their heirs and successors, of the claim of debt, and of preference in competition for rents, and in subjecting defenders to the payment of costs, and for ascertaining the amount of the sum laid out, shall take place with regard to moneys expended in the building, repairing, or adding to the mansion-houses or offices upon entailed estates under the authority of this Act, as are before enacted, with respect to moneys expended by proprietors of entailed estates, in making improvements upon their estates for increasing the rents and value of them.

Proprietors of entailed estates empowered to exchange lands.

XXXII. And whereas it may frequently happen, that the inclosing of lands in Scotland may be retarded or prevented, or at least rendered inconvenient, by heirs of entail not having it in their power to exchange small parcels of the lands of their entailed estates for other lands convenient for the entailed estate,

and more conducive to the improvement of the country in general: For remedy whereof, be it enacted by the authority aforesaid, That it shall and may be lawful for proprietors of entailed estates to excamb or make exchanges of land, with all and every person or persons, for the conveniency and advantage of the said estates, and for the improvement of the country where such estates are situated, by inclosing or otherways.

Limitation of quantity to be exchanged; for which an equivalent is to be made from lands contiguous. Value of lands exchanged, how to be adjusted. And property thereof determined.

XXXIII. That not more than thirty acres of arable land, nor more than one hundred acres of lands consisting of hills or other grounds incapable or improper by their nature for culture by the plough, of such entailed estates, lying together in one place or plot, shall be given in exchange; and that an equivalent in land, contiguous to the entailed estate with which the exchange is to be made, shall be received in place of the land given in exchange: And for ascertaining and adjusting the value of the lands proposed to be exchanged, an application shall be made for that purpose, by the proprietor of the entailed estate, to the sheriff or steward of the county within which the entailed estate is situated, who thereupon shall appoint two or more skilful persons to inspect and adjust the value of the lands proposed to be excambed or exchanged; and upon such persons settling the marches of the lands proposed to be exchanged, and reporting upon oath that the exchange will be just and equal, the sheriff or steward may, and is hereby required to authorise the exchange to be made by a contract of excambion; and which being executed and recorded in the sheriff or steward books within three months after the execution thereof, the same shall be effectual to all intents and purposes; and the lands given in exchange to the entailed estate shall be held to be a part thereof, and shall be subject to all the prohibitory, irritant, and resolutive clauses of the entail, in the same manner as if it had been originally a part of the estate; and the lands given from the entailed estate shall from thenceforth be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolutive clauses thereof.

This Act to extend to all taillies made in Scotland, whether prior or posterior to the Act of 1686.

XXXIV. That this Act shall extend to, and comprehend, all taillies of lands or heritages in that part of Great Britain called Scotland, made or to be made, and whether prior or posterior to the said Act made in the year one thousand six hundred and eighty-five.

39TH & 40TH OF GEORGE III.

CAP. XCVIII.

An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.

[28th July 1800.]

Preamble.

No person, by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the persons entitled thereto.

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions herein-after contained: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interests, dividends, or annual produce so directed to be accumulated; and in every case where

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any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

Nothing herein to extend to any provision for payment of debts, or for raising portions for younger children, or touching the produce of timber.

II. That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed.

Nor to any disposition of heritable property in Scotland.

III. That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland*.

When restrictions shall take effect with respect to wills made before the passing of this Act.

IV. That the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the devisor or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act.

5TH OF GEORGE IV.

CAP. LXXXVII.

An Act to authorize the Proprietors of Entailed Estates in Scotland *to grant Provisions to the Wives or Husbands and Children of such Proprietors.*

[21st June 1824.]

Act of the Parliament of Scotland, 1685, c. 22.
10 *Geo.* III. *c.* 51.
Provision to be granted to a wife.

WHEREAS by an Act of the Parliament of Scotland made in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, it is statuted and declared, that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, which tailzies, when completed and recorded in manner by the said act directed, are declared to be real and effectual against creditors, comprisers, adjudgers, and other singular successors whomsoever: And whereas by an Act of Parliament passed in the tenth year of the reign of his late Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements and Hereditaments, in that part of* Great Britain *called* Scotland, *held under settlement of strict Entail*, the proprietors of entailed estates in Scotland were empowered to burden their estates and the subsequent heirs of entail, for the improvement of their entailed estates, in manner specified in that Act: And whereas sundry entails of lands and estates in Scotland contain no powers in regard to the granting of provisions to the wives or husbands and children of the proprietors thereof; and in many other entails, by reason of the change in the value of money, the improved value of lands and estates in Scotland, and other causes, the powers of granting provisions to the wives or husbands and children of the proprietors of such entailed estates have become entirely inadequate for those purposes; and it has become expedient that the powers of granting such provisions should be conferred or enlarged, as the case may be,

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under certain regulations and conditions, in all entails already made or hereafter to be made: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made, in that part of Great Britain called Scotland, under the limitations and conditions after mentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates by way of annuity; provided always, that such annuity shall not exceed one third part of the free yearly rent of the said lands and estates, where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor.

Provision to be granted to a husband.

II. That it shall and may be lawful to every heir-female in possession of such entailed estate as aforesaid, to provide and infeft her husband in a liferent provision out of her entailed lands and estates by way of annuity; provided always, that such annuity shall not in any case exceed one half of the free yearly rent or free yearly value as aforesaid of the whole of the said lands and estates, after all deductions to be made from the same in manner before mentioned; but in case the said lands and estates shall already be burthened with a prior existing annuity, granted to a wife or husband under the authority of this Act, the annuity to be granted to a husband, in manner before mentioned, shall not exceed one-third part of the said yearly rent or yearly value to be taken as aforesaid.

Only two liferent provisions to be subsisting at one time.

III. That where two liferents to wives or husbands, granted under the powers hereinbefore contained, shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to take effect till one of the former subsisting liferents shall cease or expire; but the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent herein-before authorised to

be granted upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent.

Provision in certain cases to children.

IV. That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid, to grant bonds of provisions or obligations, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the grantor's death, as to him or her shall seem fit: Provided always, that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting the public burdens, liferent provisions, including those to wives or husbands authorized to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever, affecting or burthening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid, to the heir of entail in possession; (that is to say), for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole: Provided always, that such provision shall, except in the case of the settlement thereof by a marriage contract as herein-after mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

Provision settled in consideration of marriage, death of children before granter not to affect the provision.

V. That if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision, or any part thereof, shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision, or any part thereof, so settled in consideration of such marriage,

shall remain and be effectual, as if such child had survived the grantor.

Where provisions to children granted to the full extent, no further provisions to be granted till the former are diminished, &c.

VI. That where the powers herein-before contained of granting provisions to a child or children shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid, to the full extent of three years' free rent or value of the entailed estate as aforesaid, it shall not be in the power of any heir in possession of the same lands and estates, to grant further provisions to his or her child or children, till some part of the provisions granted to the extent of three years' free rent or value as aforesaid shall have been paid or extinguished; but upon the payment or extinction thereof, or of any part thereof, it shall be in the power of such heir in possession to grant provisions to his or her child or children, to the extent of the provisions so paid or extinguished as aforesaid; the heir in possession of any such entailed lands and estates as aforesaid being always hereby empowered to grant provisions to his or her child or children, to such extent of the power of granting provisions to a child or children herein-before contained, as may be open or unexercised for the time, so that the provisions to be granted do not in any case exceed the proportions aforesaid of one year's free rent or value for one child, or two years' free rent or value for two children, and of three years' free rent or value for three or more children: And provided always, that such provision shall (except in the case of the settlement thereof by a marriage-contract as herein-before mentioned,) be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and that upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

Excess in provision granted to be regulated by the Court of Session.

VII. That in every case in which the provision granted to a wife or husband, or to a child or children, under the authority of this Act, shall exceed such proportions of the rent or value of any entailed estate as herein-before mentioned, such provision shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provision shall exceed those herein authorized in each respective

be granted upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent.

Provision in certain cases to children.

IV. That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid, to grant bonds of provisions or obligations, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the grantor's death, as to him or her shall seem fit: Provided always, that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting the public burdens, liferent provisions, including those to wives or husbands authorized to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever, affecting or burthening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid, to the heir of entail in possession; (that is to say), for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole: Provided always, that such provision shall, except in the case of the settlement thereof by a marriage contract as herein-after mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

Provision settled in consideration of marriage, death of children before granter not to affect the provision.

V. That if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision, or any part thereof, shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision, or any part thereof, so settled in consideration of such marriage,

shall remain and be effectual, as if such child had survived the grantor.

Where provisions to children granted to the full extent, no further provisions to be granted till the former are diminished, &c.

VI. That where the powers herein-before contained of granting provisions to a child or children shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid, to the full extent of three years' free rent or value of the entailed estate as aforesaid, it shall not be in the power of any heir in possession of the same lands and estates, to grant further provisions to his or her child or children, till some part of the provisions granted to the extent of three years' free rent or value as aforesaid shall have been paid or extinguished; but upon the payment or extinction thereof, or of any part thereof, it shall be in the power of such heir in possession to grant provisions to his or her child or children, to the extent of the provisions so paid or extinguished as aforesaid; the heir in possession of any such entailed lands and estates as aforesaid being always hereby empowered to grant provisions to his or her child or children, to such extent of the power of granting provisions to a child or children herein-before contained, as may be open or unexercised for the time, so that the provisions to be granted do not in any case exceed the proportions aforesaid of one year's free rent or value for one child, or two years' free rent or value for two children, and of three years' free rent or value for three or more children: And provided always, that such provision shall (except in the case of the settlement thereof by a marriage-contract as herein-before mentioned,) be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and that upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

Excess in provision granted to be regulated by the Court of Session.

VII. That in every case in which the provision granted to a wife or husband, or to a child or children, under the authority of this Act, shall exceed such proportions of the rent or value of any entailed estate as herein-before mentioned, such provision shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provision shall exceed those herein authorized in each respective

6TH & 7TH OF WILLIAM IV.

CAP. XLII.

An Act to grant certain Powers to Heirs of Entail in Scotland, *and to authorize the Sale of Entailed Lands for the Payment of certain Debts affecting the same.*

[28th July 1836.]

Heirs of entail in possession empowered to grant tacks of any part of entailed estates under the restrictions herein contained.

WHEREAS by an Act of the Parliament of *Scotland* made in the year one thousand six hundred and eighty-five, entituled *Act concerning Tailzies*, it is statuted and declared that it shall be lawful to his Majesty's subjects to tailzie or entail their lands and estates, and to substitute heirs in their tailzies or entails, with such provisions and conditions as they shall think fit, and to affect the said entails with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of entail to sell, analzie, or dispose of the said lands or any part thereof, to contract debt, or do any other deed whereby the same might be apprized, adjudged, or evicted from the other substitutes in the entail, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void; and provision is made by the said Act for the recording such entails in the manner therein set forth: And whereas it is expedient that certain powers should be conferred upon heirs of entail in relation to granting tacks and making excambions, and to selling portions of entailed estates for payment of the entailer's debts: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entails already made and established, or which may hereafter be made and established, pursuant to the directions of the said Act passed in the Parliament of *Scotland* in the year one thousand six hundred and eighty-five, it shall be lawful for the respective

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heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages therein contained, for the fair rent of such lands or heritages at the period of letting, either by public auction or private bargain, and notwithstanding any prohibition against diminution of the rental, for any period not exceeding twenty-one years, and to grant tacks of any mines and minerals contained in such lands and estates, for any period not exceeding thirty-one years: Provided always, that nothing herein contained shall authorise any heir of entail in possession of any entailed lands, estates, or heritages, to take any grassum or valuable consideration, other than the tack-duty or rent, for granting any tack, or to grant any tack of the home-farm, nor of the mansion-house and offices, or of the garden, lawn, park, or policy attached thereto, for any period beyond his own life; and in case any such grassum or consideration shall be taken, or in case any tack hereby prohibited shall be granted, such tack shall be null and void.

This Act not to restrain any more extensive powers contained in any entail.

II. That nothing herein contained shall prevent, or be construed to prevent, any heir of entail in possession from exercising any power of granting tacks which may be contained in the entail under which he possesses more extensive than the power of granting tacks hereby conferred.

Heirs in possession may make excambions of entailed estates in the mode herein named.

III. That, notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entail already made and established, or which may hereafter be made and established, pursuant to the directions of the said Act passed in the Parliament of *Scotland* in the year one thousand six hundred and eighty-five, it shall be lawful for the respective heirs of entail in possession of any entailed lands, estates, or heritages, having made up a feudal title thereto, to make excambion, without the consent of any other heir, of any portion of the entailed lands, estates, or heritages, for an equivalent in lands, estates, or heritges, lying contiguous to the same, or to some other part of the said entailed estate, or being convenient to be holden with the same, and whether the same shall belong to himself in fee-simple, or to any other person, and that although the heritages to be given and taken in exchange may consist of different descriptions of heritable property: Provided always, that notice of the intention to make such excambion shall, three months previous to the application to the Court of Session to that effect, as herein-after required,

be given to the five heirs of entail, or to the whole heirs of entail, if their number be less than five, of the said entailed lands, estates, or heritages next in the order of succession to the heir so applying; and if any of the said five heirs of entail shall be under age, or under any mental or other legal disability, then to the legal guardians, curators, or administrators of such heirs; and if three or more of the said five heirs shall be under age, or under any mental or other legal disability, then to their respective guardians, curators, or administrators, and also to the two heirs next in the order of succession after such five heirs, who shall be of lawful age, and not under any mental or other legal disability; and if any of the said heirs to whom notice is thus directed to be given shall be forth of the United Kingdom, then to the known agent or factor of such absent heir or heirs; and for ascertaining and adjusting the value of the lands, estates, or heritages proposed to be exchanged, an application shall be made for that purpose by the heir of entail in possession, and feudally vested in such lands, estates, or heritages, after such notice as is herein directed to be given, by summary petition, setting forth the objects of the said excambion, and the advantages expected to be derived therefrom, to one or other of the Divisions of the Court of Session, praying for such excambion; and the said Court shall, after proof made to them of notice to the heirs of entail as aforesaid, take into consideration the expediency of such excambion, and the other circumstances of, or affecting, the lands, estates, or heritages proposed to be excambed, and the interests of the succeeding heirs of entail therein, and after such notice as is herein-after directed to be given, and hearing any party having a title and interest to be heard, if any such shall appear, shall appoint two or more skilful persons to inspect and adjust the value, and settle the marches of the said lands, estates, or heritages proposed to be excambed; and upon receiving the report upon oath of such persons, and being satisfied of the respective values of such lands, estates, or heritages, and of the expediency of such excambion, the said Court shall thereupon give judgment authorising the said excambion; and thereupon the contract of excambion shall be executed at the sight, and with the approbation of, the said Court, and recorded in the Sheriff-court Books of each of the shires or stewartry in which the lands or heritages to be excambed are situated, and also within three months in the Register of Tailzies: Provided also, that after hearing any party having a title or interest, and appearing as aforesaid, it shall be competent to the said Court to decern the expenses to be incurred by such party in such appearance to be borne either by such party, or by the heir of entail applying for the excambion, as to the said Court shall seem just.

Provision as to excambion of mansion houses, &c.

IV. That it shall not be lawful to excamb the principal mansion-house or offices, or the garden, park, lawn, home farm, or policy of any entailed estate, nor more than one-fourth in value of such entailed lands, estate, or heritages in all; and declaring that after excambions have been made under the authority of this Act to the extent in all of one-fourth part in value of the whole entailed lands, estates, or heritages, it shall not be in the power of any heir of entail to make any further excambions of any part of the said lands, estate or heritages.

Tenure of excambed lands.
Excess of value in any excambion to the amount of £200 to be paid to the proprietors.
In case of any larger excess excambion void.

V. That all contracts of excambion executed and recorded in terms of this Act shall be effectual to all intents and purposes; and the lands and heritages given or received in excambion shall be held to be a part of the entailed estate or of the entailed estates respectively, and shall be subject to all the prohibitory, irritant and resolutive clauses of the entail or entails, in the same manner as if it or they had been originally a part of such estate or estates respectively; and the lands and heritages given from the entailed estate or estates shall from thenceforth be held as out of the entail or entails under which it was previously held, and be liberated from all the prohibitory, irritant and resolutive clauses thereof; Provided always, that no debt contracted by any heir of entail during the period between the execution of any such contract of excambion and the recording of such contract in the Register of Tailzies as aforesaid shall affect or be capable of affecting the lands contained in such contract, and thereby added to the entailed estate: And provided further, that if in any such excambion as aforesaid there shall be any excess of value on either side, not exceeding two hundred pounds, such excess shall go and be paid to the proprietor, whether heir of entail in possession or proprietor in fee-simple, to whom the lands of smaller value shall be awarded; and that if any party to any such excambion shall give or shall receive any consideration or value of any kind whatever, other than the lands to be exchanged, or such excess as aforesaid not exceeding two hundred pounds, such excambion shall be null and void.

As to excambion of entailed estates under more than one entail. 10 *G.* 3. *c.* 51.

VI. That where any such heir in possession shall apply as aforesaid for the excambion of any part or parts of any entailed estate or estates under more than one deed of entail, descendible to the same series of heirs, such deeds of entail shall in reference to such application be held and construed to be one deed of entail, and the estates settled by such entail to be one entailed estate: Provided also, that an Act passed in the tenth year of the reign of his Majesty King *George* the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that part of* Great Britain *called* Scotland *held under Settlements of strict Entail*, shall remain in full force and effect, excepting in so far as the same is altered or repealed by any of the provisions of this Act.

Part of entailed estates may be sold for payment of entailer's debts affecting the estate.

VII. And for effecting the sale of portions of entailed estates for payment of the entailer's debts, be it enacted, That from and after the passing of this Act it shall and may be lawful for the heir of entail in the possession of any entailed estate liable to be adjudged or evicted for the debts or obligations of the maker of the entail, and for the tutors or curators or legal guardians of any such heir, if under twenty-one years of age or under any mental or other legal disability, to apply by summary petition to the Court of Session, in either of the Divisions of the said Court, setting forth the entail, and the debts or obligations affecting or which may be made to affect the lands or heritages contained in the said entail as aforesaid, and praying the said Court that so much of the said lands or heritages may be sold as will produce a sum adequate to discharge the debts so affecting the said estate.

Court of Session to inquire into the particulars, and direct what portion of estate shall be sold;

VIII. That it shall and may be lawful for the judges of the said Court, sitting in either of the divisions thereof, and they are hereby authorized and required, upon such petition presented to them as aforesaid, to direct due notice, according to the practice of the said Court, to be given of such petition to all concerned, to hear all parties that shall appear for their interest, to inquire into and take an account of the debts, obligations, and other burdens due by or binding upon the entailer of such estate, which affect or may be made to affect such estate as

aforesaid, and to fix and ascertain the amount of such debts, obligations, and burdens, and interest, if any, due thereupon, by interlocutors or judgments, and thereupon to inquire into and ascertain, by the investigation and evidence or report of such surveyors or other skilful persons as the said Court shall think fit to nominate and appoint for that purpose, what portions of such entailed estate sufficient to produce a price adequate to the payment of all such debts, obligations, and burdens affecting or capable of being made to affect the said entailed estate as aforesaid may be sold with the least detriment or injury to the remainder of such estate, and to take all necessary proof thereof, and of the value at which such portions of such estate ought either in whole or in lots to be exposed to sale, and thereupon to order and decern that such portions of such estate shall be sold by public roup or auction.

And cause notice of sale to be given, and adjust the conditions thereof.

IX. That the said judges shall cause notice of the intended sale or auction of such portions of such estates to be inserted in one of the newspapers published in the county or counties in which the lands or heritages to be sold lie, and also in three of the newspapers published in *Edinburgh*, three times, at least three weeks previous to the day of sale, and shall otherwise advertise and notify such sale as to the said judges shall seem necessary and proper; and the articles and conditions of roup or sale of such portions of such estates shall be adjusted at the sight and with the approbation of the said judges, and the lands or heritages be exposed to sale in such manner as the said judges shall direct; and the said judges may authorise and direct such sales respectively to be adjourned from time to time, and to be again from time to time advertised and notified as herein-before directed.

Court of Session to adjudge the Lands sold to the purchaser, and direct the disposition of the purchase money;

X. That upon the sale of such portions of such estates as aforesaid the said judges shall adjudge and decern the same, freed from all the burdens, conditions, restrictions, and provisions, clauses irritant and resolutive, and other clauses of such entail, to belong to and be the property of the purchaser or respective purchasers thereof, when and as soon as such purchaser or purchasers shall have completed such purchase or purchases by payment or consignation of the purchase money, or price or prices at or for which he, she, or they shall have purchased the same, to or with the treasurer, cashier, or manager or other proper officer of the Bank of *Scotland*, the

Royal Bank of *Scotland*, Bank of the *British* Linen Company of *Scotland*, Commercial Bank of *Scotland*, or National Bank of *Scotland* respectively, to whom the said judges shall order such payment or consignation to be made, to be placed to an account to be raised in the books of such bank in the name or names of such person or persons as the said judges shall direct; and which monies shall, when so paid in, produce the highest interest that can be obtained for the same, which interest shall by such person or persons be annually accumulated and added to the principal sum, to carry interest together, until applied, by a warrant or warrants of the said judges in either division of the said Court as aforesaid, for the purposes of this Act; and the said judges shall further pronounce such interlocutor or interlocutors and hold such other proceedings in the said matter as the judges of the Court of Session are in use to pronounce and hold in judicial sales, or as shall appear to the said judges necessary for fully carrying the purposes of this Act into execution.

Purchasers upon payment of the money, to have a good right to the lands, &c. freed from the entail.

XI. That the purchaser or purchasers in pursuance of this Act, and their heirs and assignees, shall, by the interlocutors or decrees of sale to be pronounced by the said judges, and upon full payment of the price or prices for which they shall respectively purchase to such person or persons or in such way as they shall by the articles and conditions of sale be taken bound to pay the same, have a good and undoubted right to the lands and heritages so to be purchased by them, freed and discharged of all the conditions, provisions, limitations, and restrictions of such entail, and of all the debts, obligations, and burdens by which the said lands and heritages were affected, and from every other incumbrance, defect of title, or ground of eviction whatsoever, in as full and ample a manner, sort, and form as any purchaser of lands at a judicial sale before the Court of Session may, can, or ought to have by the law and practice of *Scotland;* and the heir of entail of the estate for the time being, or his or her tutors or curators or other legal guardians as aforesaid, shall and is or are hereby required to execute and deliver, under the authority of the said judges of the Court of Session in either Division thereof as aforesaid, all such dispositions and conveyances of such portions of such estates as shall be so sold, containing procuratories of resignation, precepts of sasine, and other usual and necessary clauses as shall by the said judges be deemed necessary and proper, in favour of such purchaser or purchasers, his, her, or their heirs and assignees, without in-

curring any irritancy or forfeiture, any thing in such deed of entail to the contrary notwithstanding.

Lands not sold to continue subject to the entail.

XII. That such parts of such entailed estate as shall not be sold under the authority of this Act, in the manner herein directed, shall remain and continue settled and entailed to and upon the same series of heirs, under the same prohibitory, irritant, and resolutive clauses, provisions, and conditions as are contained in such deed of entail, but subject to the powers and provisions herein-before given by this Act.

Court of Session to direct purchase money to be applied to payment of debts, &c.

XIII. That after such sale or sales are accomplished, and the purchase money paid or consigned as aforesaid, the said judges of the Court of Session in either Division thereof shall issue their warrants or decrees for payment, out of the money so paid or consigned, of the expences of the proceedings attending such petition, inquiry, and sale, and also of the amount of such debts, obligations or burdens affecting or which might be made to affect such entailed estate as aforesaid of which such portions have been sold as aforesaid; and every creditor in such debt, obligation or burden shall upon receiving payment be obliged to execute a complete discharge of his or her debt, right or claim; and the several discharges shall be registered in the Books of Council and Session.

By whom the costs of parties interested and appearing shall be paid.

XIV. That if any party interested in such entailed estate shall have appeared and been heard before the said Court, it shall be competent for the said Court to decern the expences incurred by such party in such appearance and hearing to be borne, either by such party, or by the heir applying for such sale, either out of the price of the lands to be so sold, or otherwise as to the said Court shall seem just.

Any surplus exceeding £200 to be laid out in the purchase of other land, to be limited to same uses, &c. as lands sold;

XV. That if any surplus exceeding two hundred pounds shall remain of the price of the lands and heritages so sold, after defraying such expences, debts, obligations, or burdens directed to be paid as aforesaid, the said judges of the said Court in either of the Divisions thereof shall and they are hereby empowered and required to direct and order that such surplus shall be laid out and employed in the purchase of other lands or heritages, which

shall be limited and settled to the same uses and purposes, and under the like prohibitory, irritant, and resolutive clauses, as by the deed of entail in relation to which such proceedings have been held the lands and heritages therein described stand limited and settled.

And the deed of entail thereof to be framed at the sight of the Court of Session;

XVI. That when such surplus shall be laid out and employed in the purchase of other lands or heritages to be settled as aforesaid, the disposition, deed or settlement of entail thereof to or in favour of the heir of entail in possession for the time being, and the other heirs of entail entitled to succeed to the entailed estate to which the lands or heritages so purchased are to be added, shall be framed at the sight and with the approbation of the judges of the said Court, and shall be so framed as to bind the heir in possession or person in whose favour the same is executed as well as the succeeding heirs of entail.

And recorded in Register of Tailzies, &c.

XVII. That after such disposition, conveyance or entail shall be so made and executed, the same shall be directed by the said judges to be forthwith recorded in due form in the Register of Tailzies, for the benefit of all the persons interested therein, and infeftment shall be taken by virtue of the procuratory of resignation or the precept of sasine therein contained, and shall be registered agreeably to the forms and practice of the law of *Scotland*, upon all which the said Court shall interpose its authority by declaring that the directions by this Act given have been complied with according to the true intent and meaning thereof.

Application of surplus monies till invested in land.

XVIII. That until such surplus as aforesaid shall be applied in the purchase of other lands or heritages as aforesaid, the said judges shall order and direct that the same shall remain in one or other of the aforesaid banks respectively, subject to the direction of the said judges of that Division of the said Court to which application shall have been originally made, in the name of such person or persons as they shall have appointed, who shall receive the highest interest which can be got for the same; and the interest arising from the money so paid in shall be laid out in the name or names of such persons as aforesaid, and shall annually accumulate and be added to the principal sum so that they may carry interest together until a proper purchase in lands or heritages shall be found, to be limited and settled in the manner herein-before directed, and until the same shall be ordered

to be paid by the treasurer, cashier or manager or other proper officer of the Bank of *Scotland*, the Royal Bank of *Scotland*, Bank of the *British* Linen Company of *Scotland*, Commercial Bank of *Scotland*, or National Bank of *Scotland* respectively, for completing the said purchase in such manner as the said Court shall think just and direct: and if the money arising by the principal and accumulated interest of such sum or sums shall exceed the amount of the original purchase money, then and in that case only the surplus which shall remain, after discharging the expense of the applications to the Court, shall be paid to the person or persons respectively who would have been entitled to receive the rents and profits of the entailed lands or heritages.

If under £200 to be paid to heir in possession.

XIX. That if such surplus as aforesaid shall be under two hundred pounds sterling, the same shall be paid, by order of the said Court, to the heir in possession of such entailed estate for the time being.

Definition of Terms used in the Act.

XX. That any matter or thing permitted or prohibited to be done by any heir of entail by virtue of this Act is and shall be permitted or prohibited to be done by any trustees or trustee holding lands in trust under obligations to entail the same; and that where the words "heir" or "heirs of entail" are used in any part of this Act, such word or words shall be held and construed to include the institute equally as any substitute heir of entail.

How notices to be given of applications under this Act to Court of Session, &c.

XXI. That notice of all applications, either to the Court of Session or any Lord Ordinary of the said Court, or to any Sheriff of any county, under the provisions of this Act, by any heir of entail, shall be inserted once at least in the *London* and *Edinburgh* Gazettes, and in two or more newspapers published in *Edinburgh* and usually circulated in the part of *Scotland* in which the entailed lands and estates to which such application relates lie, and also in one newspaper published (if any so be) in such part of *Scotland* at least three months previous to the making such application; and where such application shall be to the Court of Session, the said Court or the Lord Ordinary shall, if they or he shall see cause, cause such further intimation thereof to be made in the Minute Book of the said Court or on the walls of the Parliament House or otherwise, as the said Court or Lord Ordinary shall think proper.

1ST & 2D OF VICTORIA,

CAP. LXX.

An Act to extend the Powers of an Act of the Sixth and Seventh Year of the Reign of His late Majesty, in relation to granting Tacks and making Excambions by Heirs of Entail. [4th August 1838.]

6 & 7 *W.* 4. *c.* 42.
1685. (*S.*)
Powers and provisions of recited Acts, as to tacks and excambions, further extended.

WHEREAS an Act was past in the sixth and seventh year of the reign of his late Majesty, intituled *an Act to grant certain powers to heirs of entail in* Scotland, *and to authorise the sale of entailed lands for the payment of certain debts affecting the same:* And whereas the powers granted by the said Act are granted only to heirs in possession under entails made and established pursuant to an Act passed in the Parliament of *Scotland* in the year sixteen hundred and eighty-five, intituled *Act concerning tailzies;* and it is expedient that the powers of granting tacks and making excambions, conferred by the said first recited Act, should be extended to heirs in possession of entailed estates under deeds of entail not recorded in terms of the said second recited Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all the powers of granting tacks and of making excambions conferred by the said first recited Act upon heirs of entail in possession of entailed estates, in virtue of any deed of entail made and established, or which may hereafter be made and established, pursuant to the directions of the said second recited Act, shall extend and are hereby extended to heirs of entail in possession of entailed estates under deeds of entail not recorded in terms of the said second recited Act; and all the powers, provisions, and

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clauses contained in the said first recited Act, in relation to the granting tacks and making excambions, shall, except as herein otherwise provided, extend to and be as good, valid, and effectual for carrying this Act into execution as if the same had been repeated and re-enacted in the body of this Act.

Contracts of excambion to be recorded in Sheriff Court Books.

II. That all contracts of excambion to be executed in virtue of the powers of this Act, shall be recorded in the Sheriff-court Books of each of the shires or stewartry in which the lands or heritages excambed are situated, and shall thereupon be effectual to all intents and purposes, without the necessity of being recorded in the Register of Tailzies, as by the said first recited Act required.

Where deed of entail is recorded after making an excambion, any contract entered into shall be registered at the same time.

III. That in case any excambion shall be made of lands held under a deed of entail which has not been recorded in the Register of Entails, and such deed of entail shall, after such excambion, be recorded in the said register, it shall be incumbent upon the party registering the entail to register also at the same time in the said Register of Entails any contract or contracts of excambion of any part or parts of the entailed estate entered into before the registration of the deed of entail as aforesaid, and failing the registration of such contract or contracts, such deed of entail, in so far as regards any such excambion made before the registration, shall be deemed and taken to be unrecorded in the said Register of Entails.

3D & 4TH OF VICTORIA,

CAP. XLVIII.

An Act to enable Proprietors of Entailed Estates in Scotland *to feu or lease on long Leases Portions of the same for the building of Churches and Schools, and for Dwelling-houses and Gardens for the Ministers and Masters thereof.* [4th August 1840.]

Heirs of entail may grant leases of portions of the estates for sites of Churches, &c.

WHEREAS it would be for the advancement of religion and education in *Scotland* if the proprietors of entailed estates in that country were enabled to grant in feu, or lease on long leases, portions of such estates, for the purpose of building thereon places of Christian worship, and schools, and dwelling-houses for the ministers and masters thereof, with suitable gardens to such houses: May it therefore please your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act it shall be lawful to heirs of entail for the time being in possession of entailed estates in *Scotland*, and having made up a feudal title thereto, if of lawful age, or if in pupillarity or minority, or under mental or other legal disability, then to the tutors or curators or other legal guardians of such heir, notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entail already made and established, or which may hereafter be made and established, pursuant to the directions contained in an Act of the Parliament of *Scotland* made in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, to grant or dispone in feu, or to let or lease for any period of endurance, for such yearly feu-duty or rent as may be agreed upon, though inadequate and below the just avail or value, portions of such estates respectively, not exceeding the extent

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hereinafter mentioned, as the sites of places of public Christian worship, and schools, and for burying-grounds and play-grounds for such places of public worship and schools respectively, and also for dwelling-houses and gardens for the ministers and schoolmasters thereof respectively; and the feu charters or dispositions or leases so to be granted shall be good, valid, and effectual to the grantee or lessee under the same against any subsequent heir of entail, and the granting of the same shall not infer any forfeiture, irritancy, or claim of reparation against the heir granting such feu or lease: Provided always, that the Sheriff, to whom application shall be made in manner after directed, shall be satisfied of the propriety of the measure in the whole circumstances; and that no grassum, fine, or other consideration shall be given or paid therefor, to or for the exclusive benefit or advantage of the heir of entail in possession granting such feu or lease, or of the heir of entail consenting thereto as hereinafter provided; and provided also, that the extent of ground feued or leased shall not exceed one-fourth of an acre for any one place of worship, nor one acre for any one burying-ground attached thereto, nor one-eighth of an acre for any one dwelling-house for a minister or schoolmaster, nor one acre for any school-house and play-ground attached thereto, nor half an acre for the garden attached to such dwelling-houses respectively.

Rights of heir of entail in possession not to be prejudiced.

II. That nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting feus and leases which may be contained in the entail under which he possesses, more extensive than the power of granting feus or leases hereby conferred, and without any application to the Sheriff hereby directed.

No lease to be granted without permission of Sheriff, who may refuse if he deems it injurious to succeeding Heirs.

III. That previous to the granting any such feu or lease, the heir of entail intending to grant the same shall present a petition to the Sheriff of the county within which the entailed land to be fued or leased lies, setting forth the particular description and extent of land proposed to be feued or leased, the purpose to which the same is to be applied, and the parties in whom it is to be vested in trust for such purposes, and praying the Sheriff to interpose his authority thereto; and such Sheriff shall thereupon, unless the consent in writing of the heir of entail of lawful age next in order of succession to such entailed estate shall be produced with the petition, order inti-

mation of such petition to be made to the said heir of entail next in order of succession within the United Kingdom, or if out of the United Kingdom then to the factor or agent of such next heir, if of lawful age, and if in pupillarity or minority, or under mental or other legal disability, then to the tutors or curators or other legal guardians of such heir, and shall, unless such consent shall be produced, also order notice of such petition, in such terms as he shall direct, to be published in the *Edinburgh Gazette*, and in some one newspaper, to be fixed on by him, three times, at intervals of fourteen days; and upon production to the Sheriff of such intimation and publication, if there be any such heir in existence and known, or otherwise of such publication, with a declaration by the petitioner, to which he may be required to make oath, that no such heir is in existence or known, he shall resume the consideration of the petition, and shall institute such enquiry into the circumstances of the case as he shall think necessary; and after hearing the heir of entail to whom notice shall be so given, if he shall appear to oppose the granting the prayer of the said petition, the Sheriff shall, whether appearance be made or not, if satisfied of the propriety of the measure, pronounce a deliverance interponing his authority thereto as craved, or under such limitation or qualification as he may judge necessary or proper, or he may refuse the prayer of the petition if he should deem the granting the feu or lease injurious, otherwise than as regards the feu duty or rent as aforesaid, to the interest of the succeeding heirs of entail.

Heir of entail not liable to forfeiture or loss of right by granting lease.

IV. That the authority of the Sheriff being interponed as aforesaid, it shall be lawful to the heir of entail so applying to execute a feu-charter or lease, as the case may be, in conformity with the said petition, and deliverance thereon, in favour of the Presbytery of the bounds, or the trustees, or managers, or directors of the place of Christian worship or school, respectively, and their successors in office, or such other body as may be selected and agreed upon, in trust, for the purposes set forth in such petition; and such heir shall not, by the execution of such feu charter, or long lease, incur any forfeiture, irritancy, or loss of right, any thing in the deed of entail under which he holds the entailed estate to the contrary notwithstanding.

Feu charter, when recorded, to vest lands in grantees and their successors without transfer, during the whole term of lease.

V. That the recording of such feu-charter in the General Re-

gister of Sasines (and the keepers thereof are hereby authorised and required to register the same) shall, without any infeftment thereupon, validly and effectually vest and seise the grantees in such charter in the land thereby conveyed; and such feu-charters and leases shall be effectual to the successors in office of the persons in whose favour the same shall have been granted for the trust purposes for which they were granted, without any transference or renewal of the investiture, in all time thereafter, as regards such feu-charters, and during the whole duration of such leases.

Trustees not to dispone, &c. land, or assign leases.

VI. That it shall not be competent or lawful to the parties in whose favour such feu-charters or leases shall have been granted in trust as aforesaid, or their successors in office, to dispone, let, sub-feu, or sub-let the lands so held by them, nor to assign such leases, nor to borrow money on the security of the same, nor to burden the lands held by them in any way with debts or obligations of any description; and all dispositions, sub-feus, heritable bonds or dispositions in security, leases and sub-leases of the lands so feued or leased, or assignations of such leases, and all adjudications of such lands in implement or for any such debt or obligation, shall be null and void to all intents and purposes.

Lands, or buildings thereon, not to be used for any other purpose than that for which it was granted.

VII. That it shall not be lawful to the parties in whose favour such feu charter or lease shall have been granted, or their successors, to divert the land so feued or leased, or the buildings erected thereon, to any other purpose than the purpose for which the same shall have been feued or leased; and if such land or buildings shall at any time be so diverted, or shall be, for the period of five years, left unemployed for the purposes for which the same were feued or leased, it shall be competent for the heir of entail in possession for the time being, to apply by petition to the Sheriff of the county in which the land or buildings lie, setting forth the diversion or abandonment, and praying to have the feu charter or other right or lease declared to be forfeited, and the land therein contained, with the buildings erected thereon, to belong to the heirs of entail of the estate in relation to which such feu charter or lease was granted, in all time thereafter, free from and unaffected by such feu charter or lease, and to be again subject to the destination and fetters of the entail of such estate; and the said Sheriff, after ordering intimation of such petition to the parties at the time in right of such feu-charter or lease, if known, and also public

notice to be affixed on the door of the parish church of the parish within which the land feued or leased is *quoad sacra* situated, for three successive *Sundays*, shall, on evidence of such intimation and publication being produced to him, resume consideration of the petition, and shall inquire into the alleged diversion or abandonment, and shall hear the parties in the right of the feu charter or lease, or any of the inhabitants of the parish for whose behoof the land is held, and receive any competent evidence that shall be offered by any of the parties interested; and if he shall find the allegation of diversion or abandonment proved, he shall pronounce a deliverance to that effect, and shall declare the feu charter or lease forfeited, and the portions of ground therein contained to belong to the heirs of entail aforesaid, in all time thereafter, free from and unaffected by such feu charter or lease, and subject to the destination and fetters of the entail of the estate in relation to which such feu charter or lease was granted; and such decree of declarator shall be recorded in the General Register of Sasines, and the land and subjects, to which the same relates, shall be thereafter possessed by such heirs of entail accordingly, and as if such feu charter or lease had never been granted.

Act may be altered this session.

VIII. That this Act may be amended, altered, or repealed by any Act to be passed in the present Session of Parliament.

4TH & 5TH OF VICTORIA,

CAP. XXIV.

An Act to amend an Act to grant certain Powers to Heirs of Entail in Scotland, *and to authorise the Sale of Entailed Lands for the Payment of certain Debts affecting the same.* [21st June 1841.]

6 *and* 7 *W.* IV. *c.* 42.

The insertion in contracts of excambion of certain matters contained in the original entail not necessary.

WHEREAS an Act was passed in the Session of Parliament holden in the sixth and seventh years of the reign of his late Majesty King *William* the Fourth, intituled *an Act to grant certain powers to heirs of Entail in* Scotland, *and to authorise the sale of entailed lands for the payment of certain debts affecting the same*, whereby heirs of entail were authorised to make excambions to a certain extent of their entailed lands and estates at the sight and with the approbation of the Court of Session, and to complete the same by contracts of excambion, to be approved of by the Court, and recorded in the Sheriff-court Books of the shires within which the lands lie, and also in the Register of Tailzies: And whereas doubts have arisen whether it is necessary to insert in such contracts of excambion the whole destination of heirs substitutes and successors, and the conditions and provisions, and prohibitory, irritant and resolutive clauses of the original entail, and to apply by petition to the Court of Session for leave to have the contract recorded in terms of the Act passed in the Parliament of *Scotland* in the year sixteen hundred and eighty-five, intituled *Act concerning Tailzies*, and it is expedient that such doubts should be removed: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall not be necessary to insert in any contract of excambion executed under the authority

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of the said first recited Act the whole destination of heirs substitutes and successors, or the conditions and provisions, and prohibitory, irritant and resolutive clauses of the original entail: Provided always, that reference be made in the contract to such original entail, and the date thereof, and the date of recording the same in the Register of Tailzies; and it shall be incumbent on the keeper of the Register of Tailzies to insert such contracts in the Register of Tailzies, upon the same being presented to him, without the necessity of a warrant from the Court of Session for that purpose.

Act may be altered this session.

II. That this Act may be altered or repealed by any Act to be passed in this present Session of Parliament.

11TH & 12TH OF VICTORIA

CAP. XXXVI.

An Act for the Amendment of the Law of Entail in Scotland. [14th August 1848.]

Heir born after the date of any future entail may disentail the estate; born before, may do so with consent of heir next in succession, being heir apparent under the entail.

WHEREAS the law of entail in *Scotland* has been found to be attended with serious evils, both to heirs of entail and to the community at large, and it is expedient that the same be amended in manner herein-after provided for: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That where any estate in *Scotland* shall be entailed by a deed of tailzie dated on or after the first day of *August* one thousand eight hundred and forty-eight it shall be lawful for any heir of entail born after the date of such

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tailzie, being of full age, and in possession of such entailed estate by virtue of such tailzie, to acquire such estate, in whole or in part, in fee simple, by applying to the Court of Session for authority to execute and executing, and recording in the Register of Tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided; and it shall be lawful for any heir of entail, being of lawful age, and in possession of such entailed estate by virtue of such tailzie, though born before the date of such tailzie, with the consent, and not otherwise, of the heir next in succession, being heir apparent under the entail of the heir in possession, to acquire such estate, in whole or in part, in fee simple, by applying to the Court for authority to execute and executing, and recording in the Register of Tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided: Provided always, that such consent to such instrument of disentail shall not be valid and effectual unless granted by a person of the age of twenty-five years complete, not subject to any legal incapacity, and born after the date of the tailzie to which such instrument applies.

Heir in possession under an existing entail, born after 1st August 1848, *may disentail; born before that date, may do so with consent of heir next in succession, being heir apparent born after 1st August* 1848.

II. That where any estate in *Scotland* is held by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight, it shall be lawful for any heir of entail born on or after the said first day of *August*, being of full age, and in possession of such entailed estate by virtue of such tailzie, to acquire such estate, in whole or in part, in fee simple, by applying to the Court of Session for authority to execute and executing, and recording in the Register of Tailzies, under the authority of the Court, an instrument of disentail, in the form and manner herein-after provided; and it shall be lawful for any heir of entail, though born before the said first day of *August* one thousand eight hundred and forty-eight, being of full age, and in possession of such entailed estate by virtue of such tailzie dated prior to the said first day of *August*, with the consent (and not otherwise) of the heir next in succession, being heir apparent under the entail of the heir in possession, he being born on or after the said first day of *August* one thousand eight hundred and forty-eight, and being of the age of twenty-five years complete at the time of granting such consent, and not subject to any legal incapacity, to acquire such estate, in whole or in part, in fee simple, by executing, under authority of the Court, an in-

strument of disentail as aforesaid, in the form and manner herein-after provided.

Heir of entail under an existing entail may disentail, with certain consents.

III. That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in *Scotland* holden by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight, to acquire such estate, in whole or in part, in fee simple, by applying to the Court of Session for authority to execute and executing, and recording in the Register of Tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided: Provided always, that such heir of entail in possession shall be the only heir of entail in existence for the time, and unmarried, or otherwise shall have obtained the consents of the whole heirs of entail, if there be less than three in being at the date of such consents and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir apparent under the entail and of the heir or heirs, in number not less than two, including such heir apparent, who in order successively would be heir apparent: Provided also, that the nearest heir of entail for the time entitled to succeed to such estate immediately after such heir in possession, where any such other heir exists, shall be of the age of twenty-five years complete, and not subject to any legal incapacity.

Heir of entail may sell, charge, lease, and feu, with the like consents as enable him to disentail.

IV. That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in *Scotland*, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner herein-after provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted.

Heir of entail under existing entail may excamb, with certain consents.

V. That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in *Scotland*, holden by him by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight, with the consent of the whole heirs of entail if there be less than three in being at the date of such consents and at the date of presenting application for the authority of the Court as after mentioned, or otherwise with the consent of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise with the consent of the heir apparent under the entail, and of the heir or heirs, in number not less than two, including such heir apparent, who in order successively would be heir apparent, to excamb such estate, in whole or in part, the authority of the Court of Session being always obtained thereto in the form and manner herein-after provided, and such heir of entail in possession shall be entitled to make and execute, at the sight of the Court, all such contracts of excambion and other deeds as may be necessary in order to give effect to such excambions, by the substitution of the lands to be acquired in the room and place in all respects of the lands to be disponed.

Provision for disclosure of entailer's debts which affect the estate disentailed.

VI. That where any heir of entail in possession of an entailed estate in *Scotland* shall apply to the Court of Session under this Act in order to disentail such estate, in whole or in part, or to sell, alienate, dispone, charge with debts or incumbrances, lease, feu, or excamb the same or any part thereof, he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows or children, affecting or that may be made to affect the fee of the said entailed estate or the heirs of entail, or, if there are such debts or provisions, setting forth the particulars of the same, with the amounts thereof respectively, principal, interest, and expenses, and the vouchers by which the same are instructed, and the names, designations, and residences of the parties in right of the same; and the Court shall not proceed with such application until such affidavit is lodged; and if the Court shall see cause, intimation of such application may be ordered to be made to the parties in right of the said debts or provisions or any of them, with a view to such parties appearing for their interest, if they shall see fit; and it shall be lawful for the Court to order such provision as may appear just to

be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same; and any person who shall wilfully make such affidavit falsely shall be deemed to be guilty of perjury, and be punishable accordingly.

Creditors in entailer's debts, &c., using inhibition, not to be affected by instrument of disentail.

VII. That any party in right of an entailer's debt or of any other debt, or of any provision to a husband, widow, or younger child, affecting or that may be made to affect the fee of any entailed estate in *Scotland*, and who before the expiry of one year from the date of recording an instrument of disentail of such estate in the Register of Tailzies shall use and record inhibition in reference to such debt against the heir of entail in possession of such estate for the time, shall be entitled to affect such estate in respect of such debt or provision as if no such instrument of disentail had been recorded as aforesaid, and no debt or charge on such estate, or right whatsoever therein, which would not have competed with such debt or provision had such instrument of disentail not been recorded, shall be allowed to compete therewith by reason of the recording of such instrument of disentail.

Settlements by marriage contract not to be disappointed.

VIII. That where any heir of entail in possession of an entailed estate in *Scotland* holden by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight, or the heir apparent to such estate, shall, together or separately, have secured by obligation in any marriage contract the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession, or heir apparent, or either of them, to apply for or to consent to the disentail of such estate, until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who, by himself or his guardian, shall consent to such disentail, or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in such application or consent.

Heirs of entail not to give consent in opposition to creditors in debts now existing.

IX. That where any heir of entail called to the succession of an entailed estate in *Scotland* by any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight, shall have borrowed money previous to the passing of this Act on the security or credit of his right of succession to or interest in such entailed estate, such heir shall not be entitled to give consent to any application under this Act which shall be opposed by any creditor to whom such heir stands indebted in respect of money borrowed as aforesaid, and who shall either hold infeftment in the entailed estate, duly recorded, in security of his said debt, or shall enter appearance, and prove the same, in the course of the proceedings under such application: Provided always, that it shall be competent to the Court of Session, if, with reference to any offer of adequate security, or otherwise in the circumstances, it shall deem the opposition on the part of such creditor to be unreasonable, to disallow the same, and to give effect to the consent of such heir.

Heir apparent under future tailzie, not to give consent in opposition to his creditors.

X. That where any heir apparent of an entailed estate in *Scotland* under a tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight shall subsequent to the passing of this Act borrow money on the security or credit of his right of succession to or interest in such entailed estate, such heir apparent shall not be entitled to give consent to any application under this Act, except under the like circumstances as would have enabled him to give consent, and to have his consent allowed, had such money been borrowed previous to the passing of this Act; but the consents of the other heirs substitute shall be given and allowed independently of the rights of any such creditors.

Creditor of an heir empowered to disentail, may affect the estate for payment of his debt.

XI. That any creditor of an heir of entail in possession of an entailed estate in *Scotland* who is by this Act empowered by himself alone, without the consent of any other party, to acquire such estate in fee simple, by executing and recording an instrument of disentail as aforesaid, shall be entitled to affect such estate for payment of debt, and have the same rights and interests therein as if such instrument of disentail had been duly executed

and recorded, albeit such heir in possession may not have duly executed and recorded such instrument of disentail.

Acts 10 *Geo.* III. *c.* 51, *and* 5 *Geo.* IV. *c.* 87, *not to apply to future tailzies.*

XII. And whereas an Act was passed in the tenth year of the reign of his Majesty King *George* the Third, intituled *an Act to encourage the improvement of lands, tenements, and hereditaments in that part of* Great Britain *called* Scotland *held under settlements of strict entail,* and another Act was passed in the fifth year of the reign of his Majesty King *George* the Fourth, intituled *an Act to authorise the proprietors of entailed estates in* Scotland *to grant provisions to the wives or husbands and children of such proprietors;* be it enacted, that neither of the two last recited Acts shall be applicable to any tailzie dated on or after the first day of *August* one thousand eight hundred and forty-eight.

Heir having obtained decree for expense of improvements may grant bond of annual rent.

XIII. That where an heir of entail in possession of an entailed estate holden by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight shall have executed improvements on such estate previous to the passing of this Act, and shall have obtained decree for three fourth parts of the sums expended thereon, in terms of the said recited Act of the tenth year of the reign of his Majesty King *George* the Third, and shall also have obtained the authority of the Court of Session as after mentioned, it shall be lawful for such heir to execute, in favour of any party he may think fit, a bond of annual rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of his own life and twenty-five years thereafter, such annual rent during his own life not exceeding the legal interest of the said three fourth parts of the sums expended as aforesaid, and during the twenty-five years after his decease not exceeding the sum of seven pounds two shillings for every one hundred pounds of such three fourth parts as aforesaid, and so in proportion for any greater or less sum, and such annual rent being payable by equal moieties, half-yearly at the terms of *Whitsunday* and *Martinmas,* beginning the first term's payment at the first term of *Whitsunday* or *Martinmas* after the date of the bond for the proportion of annual rent then due, with legal interest, and penalties in case of failure.

Heir in future expending money in improvements may grant bond of annual rent.

XIV. That where an heir of entail in possession of an entailed estate holden by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight shall execute improvements on such estate subsequent to the passing of this Act, and obtain decree for three fourth parts of the sums expended thereon, in terms of the said recited Act of the tenth year of the reign of his Majesty King *George* the Third, and shall also obtain the authority of the Court as after mentioned, it shall be lawful for such heir of entail to execute, in favour of any party he may think fit, a bond of annual rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of twenty-five years from and after the date of such decree, or during such part of the said period of twenty-five years as may remain unexpired at the date of such bond, such annual rent not exceeding the sum of seven pounds two shillings for every one hundred pounds of the whole of the sums expended as aforesaid, and so in proportion for any greater or less sum, and being payable half-yearly by equal moieties at the terms of *Whitsunday* and *Martinmas*, beginning the first term's payment at the first term of *Whitsunday* or *Martinmas* after the date of the bond, for the proportion of annual rent then due, with legal interest, and penalties in case of failure.

Executor may call on heir in possession to grant bond of annual rent.

XV. That where any heir of entail in possession of an entailed estate in *Scotland* shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of the said last recited Act, and died without having executed a bond of annual rent, as herein before authorised, or having charged the estate as herein-after authorised, and where decree shall have been obtained, in terms of the said last recited Act, for three fourth parts of the sums expended thereon, it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate to execute, in favour of any party such petitioner may think fit, a bond of annual rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of twenty-five years from the date of the

death of the heir of entail who shall have executed the improvements, such annual rent not exceeding the sum of seven pounds two shillings for every one hundred pounds of such three fourth parts aforesaid, and so in proportion for any greater or less sum, and such annual rent being payable half-yearly by equal moieties at the terms of *Whitsunday* and *Martinmas*, beginning the first term's payment, notwithstanding the date of such bond of annual rent, at the first term of *Whitsunday* or *Martinmas* after the date of the death of the heir of entail who shall have executed the improvements, for the proportion of annual rent then due, with legal interest, and penalties in case of failure, which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court: Provided always, that the heir of entail in possession required to grant and granting such bond shall be entitled to impute towards payment of the sums thereby due any excess of sums which may have been paid by or recovered from him in payment of the said improvement debt beyond the amount of annual rents due from and after the decease of the heir who shall have executed such improvements.

Proceedings where improvements not executed in terms of 10 *Geo.* III.

XVI. That where an heir of entail in possession of any entailed estate holden by virtue of any tailzie dated prior to the said first day of *August* one thousand eight hundred and forty-eight shall, whether prior or subsequent to the passing of this act, have executed improvements on such estate of the nature of the improvements contemplated by the said last recited act but shall not have obtained decree therefor in terms of the said Act, by reason of the provisions thereof not having been adopted or not having been duly complied with, it shall be lawful for such heir to apply by summary petition to the Court in manner herein-after provided, setting forth such improvements, and the amount of money, not exceeding the amount authorised by the said Act, expended thereon, and praying the Court for authority to grant bond of annual rent as is herein-before provided in the case of improvements for which decree in terms of the said Act has been obtained; and the Court shall, after such proceedings as they may think fit to direct or to adopt, proceed to consider such application, and to take such evidence, and institute such inquiry into the facts alleged in such petition, as they shall judge necessary; and if it shall appear to the Court that such improvements are of the nature contemplated by the said Act, and that such expenditure was *bona fide* made, they shall find accordingly, and shall also grant warrant for execution of a bond of annual rent as herein provided in the cases of im-

provements for which decree in terms of the said Act has been obtained.

No adjudication for annual rent.
Annual rent how to be recovered.
Annual rent to be kept down.

XVII. That so long as any entailed estate remains subject to the tailzie thereof, or is not liable to be disentailed by the heir of entail in possession without the consent of any other party, no bond of annual rent to be granted under the authority of this Act shall be made the ground of adjudication or eviction of such entailed estate or any part thereof; and the annual rents contained in such bond shall be recoverable as accords of law from and out of the rents and profits of such entailed estate, and from the heir in possession thereof for the time being; provided always that the heir in possession of any such entailed estate, and the heirs substitute to him, shall be bound, each during his own possession, yearly and each year to pay and keep down such annual rents accruing during their respective possessions of such entailed estate; and no remedy shall be competent to the creditor in such bond of annual rent against the rents and profits of the said estate for any arrears beyond two years' annual rent, and interest thereon, and corresponding penalties; without prejudice to his remedy for such arrears against the heirs in possession respectively bound to pay and keep down the same, and against the representatives of such heirs, and the separate estates of such heirs, including the rents of such entailed estate during their respective periods of possession.

Heir of entail may charge estates by granting bond and disposition in security.

XVIII. That in all cases in which it may be competent for an heir of entail in possession of an entailed estate in *Scotland*, or in which such heir of entail may be called upon to grant a bond of annual rent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon to charge, under the authority of the Court of Session, as aftermentioned, the fee and rents of such estate, other than the mansion house, offices, and policies thereof, or the fee and rents of any portion of such estate, other than as aforesaid, with two third parts of the sum on which the amount of such bond of annual rent if granted would be calculated in terms of this Act, by granting, in favour of any creditor who may advance the amount of such two third parts, bond and disposition in security over such estate or any portion thereof other than as aforesaid for

such amount, with the due and legal interest thereof from the date of such advance till repaid, and with corresponding penalties; and such bond and disposition in security may be in the like form, and shall have the like effect and operation, and be subject to the like conditions and provisions as to keeping down interest, and as to the extent of remedy against the fee and rents of the entailed estate, and otherwise, as are herein-after made and provided in regard to bonds and dispositions in security by this Act, authorized to be granted in respect of provisions to younger children.

Bonds of annual rent or of dispositions in security for improvements to operate as discharges.

XIX. That the granting under the authority of this Act of any bond of annual rent, or bond and disposition in security, in respect of any improvements executed or to be executed on an entailed estate in *Scotland*, shall operate as a discharge of all claims for or on account of such improvements, against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annual rent or bond and disposition in security themselves.

Private roads to be deemed improvements under 10 *Geo.* III. *c.* 51, *and under this Act.*

XX. That private roads which shall from and after the first day of *August* one thousand eight hundred and forty-eight be made through any entailed estate, or by way of immediate access thereto, may be deemed to be improvements falling under the said recited Act passed in the tenth year of the reign of his late Majesty King *George* the Third and also under this Act, in the same way and manner in all respects as inclosing, planting, and draining.

Provisions to younger children may be made charges upon the entailed estate.

XXI. That in all cases where an heir of entail in possession of an entailed estate in *Scotland* shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail by way of provisions to younger children, in terms of the said recited Act passed in the fifth year of the reign of his Majesty King *George* the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, and in all cases where any heir of entail in possession as aforesaid shall in the marriage contract of his

younger child have validly granted provision for such younger child out of the rents and proceeds of such entailed estate, in terms of the said recited Act, or in terms of such deed of entail, it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security over such estate, or such portion thereof other than as aforesaid, for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date, till repaid, and with corresponding penalties; and such bond and disposition in security may be in ordinary form, binding the granter and his heirs of entail in their order successively to repay the principal sum therein, with interest and penalties as aforesaid, and may contain all clauses usual in bonds and dispositions in security granted over estates in *Scotland* held in fee-simple.

Heir in possession to keep down the interest on provisions to children.

XXII. That such heir of entail in possession, and the heirs substitute to him in their order successively, shall be bound, each during his own possession of such estate, yearly and each year, to pay and keep down the interest on such bonds and dispositions in security accruing during their possession respectively of such entailed estate; and the remedy competent to the creditor against the fee and rents of such estate on such bonds and dispositions in security shall be limited to the principal sum therein contained, with two years interest thereon, and corresponding penalties: without prejudice to the remedy of the creditor for any further arrears of interest against the heir or heirs in possession bound to pay and keep down the same, and against his or their representatives, or his or their separate estate or estates, including the rents of the said entailed estate during his or their possession of the same.

Provisions to children not to be charged without authority of Court.

XXIII. That no heir of entail in possession of an entailed estate shall charge the same under this Act with any provision to any younger child or children until he shall have applied for and obtained the authority of the Court thereto in the form and manner herein-after provided; and such application to the Court shall set forth in a schedule to be annexed thereto the specific portion of the estate which it is proposed to include in such bonds and dispositions in security.

Power to grant feus or long leases.

XXIV. That, notwithstanding any prohibitory, irritant, and resolutive clauses, or any limitation by way of maximum or minimum of the extent of ground to be feued or to be granted in each separate feu, contained in any tailzie dated prior to the first day of *August* one thousand eight hundred and forty-eight, it shall be lawful for an heir of entail in possession of an entailed estate in *Scotland*, upon notice to the heir of entail next entitled to succeed to such estate immediately after such heir of entail in possession, with the approbation of the Court, to be obtained in the form and manner herein-after provided, to grant feus or long leases of any part of the said entailed estate for the highest feu duty or rent that can be got for the same, such feus or long leases so granted by him not exceeding in all one-eighth part in value for the time of such estate; provided always, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the tack duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion-house, offices, or policies of the estate; and such heir shall be entitled to make, at the sight of the Court, all such feu charters or other feu rights, or tacks or leases, as shall be necessary; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted, such feu or lease shall be null and void; but nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting feus or leases which may be contained in the tailzie under which he possesses, more extensive than the power of granting feus or leases hereby conferred.

Where entailed estate may be charged with debt, estate may be sold for payment thereof.

XXV. That in all cases in which it is made competent by this Act for any heir of entail in possession of an entailed estate in *Scotland* to charge the same with debt, by granting bonds and dispositions in security therefor over such estate, freed from all the clauses prohibitory, irritant and resolutive contained in the tailzie in virtue whereof such estate is holden, and also in all cases in which such charge is made competent by any Act of Parliament, but no power of sale granted to the heir of entail, and in all cases in which the fee of an entailed estate is validly charged with debt, it shall be lawful for the heir of entail in possession for the time being to sell and dispose of any portion or portions of such estates, other than the mansion-house,

offices, and policies thereof, which may be necessary, and which the Court of Session may select as most suitable and proper to be sold and disposed of for the purpose of paying off the debt in respect of which such charge has been or might be competently made; and it shall be lawful for such heir of entail in possession to grant, at the sight and under authority of the Court, valid and effectual dispositions in fee simple in ordinary form of such portion or portions of the said estate, to the purchaser thereof, and his heirs or assignees; and the price to be obtained for the portion or portions of the estate to be so sold shall be previously approved of by the Court, and shall be paid into Court, under the application for sale, by the purchaser, who shall by such payment be fully discharged of such price, and have no interest, concern, or responsibility as to the application thereof; and such price shall be applied, at the sight of the Court, in or towards payment or extinction of the said debt; and the surplus of such price remaining after payment of the said debt, and of the expenses attending the application for sale and procedure thereon, shall, if more than two hundred pounds, be invested in other lands or heritages, to be added to the remainder of such entailed estate, or be laid out and expended in or towards payment of entailer's debts, or in or towards payment of any money charged on the fee of such entailed estate under this or any other Act, or in redemption of the land tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements, as may be deemed most advisable; and if such surplus shall be invested in other lands or heritages, to be added to the remainder of such entailed estate, the tailzie of such other lands or heritages shall, whatever be its actual date, be taken to be of equal date with the tailzie of the remainder of such entailed estate; and if such surplus be less than two hundred pounds, the same shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof, all at the sight and under the direction of the Court of Session.

Money arising from sale of estate, and trust money, may be applied in payment of entailer's debts, &c.

XXVI. That in all cases where money has been derived or may hereafter be derived from the sale or disposal of any portion of an entailed estate in *Scotland*, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate, under any private or other Act of Parliament, or where any money has been invested in trust for the purpose of purchasing lands to be settled upon the series of

heirs entitled to succeed to such entailed estate, and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such tailzie, and where the heir in possession of such entailed estate could by virtue of this Act acquire to himself such estate in fee simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court, in manner herein-after provided, for warrant and authority, and the Court upon such application shall have power to grant warrant and authority to and in favour of such heir of entail, for payment to such heir of such sums of money, as belonging to himself in fee simple; but if such heir of entail shall not be entitled to acquire such estate in fee simple, then it shall be lawful for such heir, with the approbation of the Court, to lay out such money or any portion thereof in or towards payment of entailer's debts, or in or towards payment of any money charged on the fee of such entailed estate under this or any other Act, or in redemption of the land tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements; and in such case such heir shall apply summarily to the Court in manner herein-after provided, setting forth the amount of the sums proposed to be laid out, and the special purpose to which it is intended to apply the same; and if the Court shall be satisfied of the propriety of the proposed application, they shall issue a finding or decree to that effect, and authorising such application; and it shall thereafter be lawful for the heir so applying to lay out such money or any part thereof, according as the Court shall have authorised the application of the same, to all or any of the before-mentioned purposes; and if there shall be any surplus of such money after the purposes authorised by the decree of the Court shall be fulfilled, the same shall, if more than two hundred pounds, be applied as the whole money would have been applied but for the provisions of this Act, and if less than two hundred pounds shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof.

Money vested in trust for the purchase of land to be entailed, may be dealt with as if it were the entailed land.

XXVII. That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried

into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as herein-after provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee simple; and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee simple, have power to grant such warrant and authority.

Date of Act of Parliament, &c., directing entail deemed to be the date at which land should have been entailed.

XXVIII. That for the purposes of this Act, the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.

Provisions to wives and children may be granted out of money vested in trust for the purchase of lands to be entailed.

XXIX. That where any money or other property, real or personal, has prior to the first day of *August* one thousand eight hundred and forty-eight been invested in trust for the purpose of purchasing land to be entailed, or where any land has prior to the said date been directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land for the time, to grant provisions in favour of his or her husband or wife and younger children out of such money or other property, or out of such land, as the case may be, of such and the like amount and extent as he or she would have been entitled to grant out of the land if entailed, and if subject to the provisions and enactments of the said recited Act passed in the fifth year of the reign of his Majesty King *George* the Fourth.

Creditor not to sell land in excess of what is necessary to pay debt affecting the estate, and reinvestment of surplus.

XXX. That no creditor acting under powers of sale contained in any bond or disposition in security or other deed of security

heirs entitled to succeed to such entailed estate, and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such tailzie, and where the heir in possession of such entailed estate could by virtue of this Act acquire to himself such estate in fee simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court, in manner herein-after provided, for warrant and authority, and the Court upon such application shall have power to grant warrant and authority to and in favour of such heir of entail, for payment to such heir of such sums of money, as belonging to himself in fee simple; but if such heir of entail shall not be entitled to acquire such estate in fee simple, then it shall be lawful for such heir, with the approbation of the Court, to lay out such money or any portion thereof in or towards payment of entailer's debts, or in or towards payment of any money charged on the fee of such entailed estate under this or any other Act, or in redemption of the land tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements; and in such case such heir shall apply summarily to the Court in manner herein-after provided, setting forth the amount of the sums proposed to be laid out, and the special purpose to which it is intended to apply the same; and if the Court shall be satisfied of the propriety of the proposed application, they shall issue a finding or decree to that effect, and authorising such application; and it shall thereafter be lawful for the heir so applying to lay out such money or any part thereof, according as the Court shall have authorised the application of the same, to all or any of the before-mentioned purposes; and if there shall be any surplus of such money after the purposes authorised by the decree of the Court shall be fulfilled, the same shall, if more than two hundred pounds, be applied as the whole money would have been applied but for the provisions of this Act, and if less than two hundred pounds shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof.

Money vested in trust for the purchase of land to be entailed, may be dealt with as if it were the entailed land.

XXVII. That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried

into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as herein-after provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee simple; and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee simple, have power to grant such warrant and authority.

Date of Act of Parliament, &c., directing entail deemed to be the date at which land should have been entailed.

XXVIII. That for the purposes of this Act, the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.

Provisions to wives and children may be granted out of money vested in trust for the purchase of lands to be entailed.

XXIX. That where any money or other property, real or personal, has prior to the first day of *August* one thousand eight hundred and forty-eight been invested in trust for the purpose of purchasing land to be entailed, or where any land has prior to the said date been directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land for the time, to grant provisions in favour of his or her husband or wife and younger children out of such money or other property, or out of such land, as the case may be, of such and the like amount and extent as he or she would have been entitled to grant out of the land if entailed, and if subject to the provisions and enactments of the said recited Act passed in the fifth year of the reign of his Majesty King *George* the Fourth.

Creditor not to sell land in excess of what is necessary to pay debt affecting the estate, and reinvestment of surplus.

XXX. That no creditor acting under powers of sale contained in any bond or disposition in security or other deed of security

affecting any entailed estate in *Scotland*, by virtue of this or any other Act, shall be entitled to sell such entailed estate, or any portion or portions thereof, in manifest excess of what is necessary or proper in order to payment and extinction of the debt, principal and interest, and whole expenses appertaining thereto, for which such sale is made; and any judgment of the Court of Session pronounced in any suspension of any such intended sale on the ground of manifest excess shall be final, and not subject to appeal; and wherever upon a sale of such entailed estate or of any portion or portions thereof by such creditor acting under such powers as aforesaid there shall arise a surplus of the price after payment of such debt, principal and interest, and whole expenses effeiring thereto, such creditor shall only be entitled to payment from the purchaser of the amount of such debt, principal and interest, and whole expenses effeiring thereto; and such creditor and purchaser shall be bound forthwith to present or cause to be presented an application to the Court, setting forth such surplus, and praying for the reinvestment thereof in other lands or heritages, to be entailed, at the sight of the Court, on the same series of heirs, and, as far as may be, in the same terms, and subject to the same prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive as are contained in the tailzie under which the estate or the portion or portions thereof so sold was or were holden previous to such sale, or for the disposal of such surplus in such other manner as the Court may direct consistently with the provisions of this Act; and on such application being presented the Court shall ordain the petitioner, or other party in whose hands the admitted surplus may be, to pay the same into bank, and to produce a receipt therefor, taken payable as the Court may direct, and shall also appoint such intimation and advertisement of the application as they may deem proper; and it shall be competent to the Court under such application to ascertain and determine the just amount of such surplus, and to give decree for the same, and to exonerate and discharge the creditor and purchaser, and all others thereof, and also, if such surplus shall exceed two hundred pounds, to see to the reinvestment thereof in other lands or heritages, and to the entailing of such lands or heritages as aforesaid, or to the disposal of such surplus in such other way and manner as may be consistent with the provisions of this Act, and as may appear to the Court to be suitable and proper; and if such surplus shall be reinvested in other lands or heritages as aforesaid, the tailzie of such other lands or heritages shall, whatever be its actual date, be taken to be of equal date with the tailzie of the remainder of such entailed estate; and if such surplus shall not exceed two hun-

dred pounds the Court shall order the same to be paid over to the heir of entail in possession, for his own use and behoof.

Guardians may consent for minors.

XXXI. That unless where inconsistent with any other provisions of this Act, it shall be competent for the Court of Session, where any heir of entail whose consent is required under this Act shall be under age, or subject to any legal incapacity, to appoint, in the course of any application to which such consent is required, a separate tutor ad litem, or curator ad litem, or curator bonis, or other guardian, to each such party; and such tutor ad litem, or curator ad litem, or curator bonis, or other guardian, being so appointed by the Court, shall be charged with the interest of such party in reference to such application, and shall be entitled, with or without consideration, to act and to give consent on the behalf of such party; and no tutor or curator or other legal guardian who may give any consent under this Act on behalf of any heir substitute shall incur any responsibility on account of such consent in respect of any alleged error in judgment, or inadequacy of consideration, or want of consideration therefor, unless it shall also be alleged and proved that he acted corruptly in the matter; and such consent by such tutor or curator or other legal guardian shall be in all respects as effectual as if the same had been given by such heir himself when of full age and of legal capacity to act in his own affairs: Provided always, that no heir of entail in possession of an entailed estate in *Scotland*, or whose own consent shall be required in the application, shall be entitled to give consent on the behalf of any other party in reference to any application for disentail of such estate.

Form and effect of instrument of disentail, and registration thereof.

XXXII. That an instrument of disentail under this Act may be in the form or as nearly as may be in the form set forth in the schedule to this Act annexed, and it shall be the duty of the Keeper of the Register of Tailzies for the time being to record such instrument, when duly presented, under authority of the Court for that purpose, in the Register of Tailzies, along with the decree of Court on which it proceeds, upon payment of such fee for the same as may be fixed by the Court by Act of Sederunt; and such instrument, when duly executed and recorded in the Register of Tailzies, under authority of the Court in terms of this Act, shall have the effect of absolutely freeing, relieving and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restric-

tions, limitations, and clauses irritant and resolutive of the tailzie under which such estate is held, and of entitling such heir in possession to alter the course of succession prescribed by such tailzie, and to alienate and dispone such estate, onerously or gratuitously, and to burden the same with debt, and to do any other act or deed in relation thereto competent by law to any absolute proprietor in fee simple: Provided always, that such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or incumbrances, or rights, or interests, of whatsoever kind or description, held by third parties, and lawfully affecting the fee or rents of such estate, or such heir in possession or his successors, other than the rights and interests of the heirs substitute of entail in or through the tailzie under which such estate is held, but that all such charges, burdens, and incumbrances, and rights, and interests, other than as aforesaid, shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded.

Applications to the Court.

XXXIII. That it shall be lawful for any heir of entail in possession of an entailed estate in *Scotland*, desiring to take advantage of any of the provisions of this Act as to which the authority of the Court is by this Act required, to make application to that effect by way of summary petition to the Court, and such petition shall set forth the tailzie under which such estate is held, and the date of the petitioner's infeftment therein, if any be, and the names, designations, and places of abode, so far as known to the petitioner, of the heirs substitute of entail (if any) whose consents are required to such petition, and whether such heirs substitute are of age to consent on their own behalf, and if not then the names, designations, and places of abode of their fathers, or tutors or curators or other legal guardians, and if such heirs substitute or any of them are the children of such heir of entail in possession himself, and are minors, or legally incapacitated to act in their own affairs, the same shall be stated in such petition, and such petition shall also set forth specifically to what extent and in what way and manner such estate is proposed to be affected.

Intimation of Petitions.

XXXIV. That the Court, on any such petition being presented to it in terms of this Act, shall appoint intimation thereof to be made in the Minute Book and on the walls in common form, and shall also appoint the same to be publicly advertised once in the *Edinburgh Gazette*, and at least once weekly for six

successive weeks, or for any longer period the Court shall deem fit, in such newspaper or newspapers as shall be appointed by the Court; and it shall be sufficient in such advertisements to state the leading name of such lands by which the same are commonly known, without any detailed description thereof.

Procedure in Court.

XXXV. That after intimation and advertisement as aforesaid in terms of such deliverance of the Court it shall be competent to such petitioner to move the Court to grant the prayer of such petition; and if the procedure shall appear to the Court to be regular and proper, the Court shall interpone their authority, and give decree authorizing such petitioner to do and perform the Act or Acts proposed in such petition, in so far as the same may appear to the Court to be permitted by this Act, or the Court shall do otherwise in reference to such petition as may appear to them to be proper, and consistent with this Act: Provided always, that it shall be competent, at any time before decree is actually pronounced and extracted, for any person or persons having interest to compear and object on any relevant ground to the prayer of such petition; and in the event of such objection being offered the Court shall investigate and dispose of the same by such form of procedure as may seem to the Court to be expedient and proper; and in all applications presented under this Act it shall be competent to the Court to decern for costs of suit against the parties to the proceedings, or any of them, or to decern for payment thereof out of the estate or fund to which such applications respectively relate.

Heirs to be called in Proceedings under this Act.

XXXVI. That it shall not be necessary in any proceedings under this Act to call as parties thereto any heirs of entail other than those whose consent would be required by the heir in possession for the time to an instrument of disentail; and no heir of entail other than those whose consent would be required as aforesaid shall be entitled to appear or to be heard in such proceedings.

Excambions under the Act 6 & 7 Will. IV. c. 42, may be carried through under the Forms of this Act.

XXXVII. And whereas by the said recited Act passed in the Session of Parliament holden in the sixth and seventh years of the reign of his late Majesty King *William* the Fourth certain powers to make excambions are conferred upon heirs of entail, certain notices being given to heirs substitute and others, and certain advertisements made, and certain procedure had before

the Court of Session, all as in the said recited Act especially provided; and it is expedient to simplify the mode of effecting excambions under the said Act, and to diminish the expense thereof; be it enacted, That from and after the passing of this Act it shall not be necessary for any heir of entail in possession intending to effect any excambion under or by virtue of the said recited Act to adopt any of the procedure thereby required, but it shall be competent to such heir of entail to present an application to the Court by way of summary petition in the form and manner provided by this Act, and the Court shall entertain, proceed with, and dispose of the same in every respect as if the powers to effect excambions conferred by the said recited Act had been contained in and conferred by this Act; and further, it shall not be necessary to record any contract of excambion which shall be executed at the sight and with the approbation of the Court as required by the said recited Act, in any other Register than the Register of Tailzies.

Instruments of disentail to be final.

XXXVIII. That any instrument of disentail recorded in the Register of Tailzies under the authority of the Court, where the judgment of the Court allowing such instrument of disentail has not been brought under review of the House of Lords by appeal, or where such judgment has not been brought under reduction upon any relevant ground during the period within which such judgment might have been appealed from, shall, as regards any third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of this Act, but in respect of any such ground of challenge be final and conclusive.

In future entail, irritant and resolutive clauses implied in warrant to record.

XXXIX. That in any tailzie dated on or after the first day of *August* one thousand eight hundred and forty-eight, containing an express clause authorising registration in the Register of Tailzies, it shall not be necessary to insert any irritant or resolutive clauses in order to render such tailzie effectual in terms of an Act of the Parliament of *Scotland* passed in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, but such clause of registration shall have in every respect the same operation and effect as the most formal irritant and resolutive clauses duly applied to every prohibition, condition, restriction, and limitation contained in such tailzie, except only such prohibitions, conditions, restrictions, and limitations as by the terms of such tailzie may be specially excepted; and

such clause authorising registration in the Register of Tailzies shall be engrossed as part of such tailzie in the Register of Tailzies when such tailzie is recorded therein, and shall also be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of seisin following on such tailzie, in the same manner, or as nearly as may be in the same manner, as irritant and resolutive clauses are now required to be so inserted or referred to.

Irritancy not to affect conveyances or securities.

XL. That no irritancy committed or that may be committed by any heir of entail in possession of an entailed estate in *Scotland* shall operate to set aside, impair, or in any way affect, directly or indirectly, in the person of any purchasers or *bona fide* onerous creditors, any conveyances, deeds, or securities granted in reference to such estate, or the rents thereof, prior to the execution of the summons of declarator on which decree in respect of such irritancy shall proceed, and not invalid as being inconsistent with the provisions of the entail under which such estate is held.

39 & 40 *Geo.* III. *applied to heritable property in Scotland.*

XLI. And whereas an Act was passed in the thirty-ninth and fortieth years of the reign of his Majesty King *George* the Third, intituled *an Act to restain all trusts and directions in deeds or wills whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited*, by which Act it is provided and enacted, "that nothing in this Act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland;*" and it is expedient that the provisions of the said Act should be extended to heritable property in *Scotland;* be it enacted, That the said provision and enactment of the said recited Act shall be and the same is hereby repealed, and the said Act shall in future apply to heritable property in *Scotland.*

Proceedings may be taken under this Act, though entail not recorded or heir infeft.

XLII. That all the Acts hereby permitted to be done by an heir in possession of an entailed estate, in virtue of the deed of entail under which such estate is held, may be done by such heir, whether such deed of entail be recorded in the Register of Tailzies or not, or whether such heir be duly infeft in such estate or not.

Entail defective in any one prohibition to be bad as to all.

XLIII. That where any tailzie shall not be valid and effectual in terms of the said recited Act of the *Scottish* Parliament passed in the year one thousand six hundred and eighty-five, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken from and after the passing of this Act to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie; and no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions; and where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing lands to be entailed, or where any lands are or shall be directed to be entailed, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this Act in all respects as such lands might have been dealt with if entailed in terms of such trust or directions.

Instruments of disentail may be registered in the Registers of Sasines.

XLIV. That it shall be lawful for and incumbent upon the Keepers of the Registers of Sasines of every county in which any lands contained in any instrument of disentail are situated and of the Keepers of the General Register of Sasines at *Edinburgh* respectively to record any such instrument of disentail, and any decree of the Court pronounced under this Act, when presented to them for that purpose, on payment of such fees for the registration thereof as may be fixed by the Court by Act of Sederunt.

No irritancy or forfeiture to be incurred for any thing done under this Act.

XLV. That no heir of entail or other person shall, by taking advantage of the provisions of this Act, or by acting under the same, incur any irritancy or forfeiture under any tailzie, any thing in such tailzie to the contrary notwithstanding; and no disposition, or bond and disposition in security, or bond of annual rent, or other deed, instrument, or writing, granted under

authority of this Act, shall be held as any contravention of or be in any way affected by any prohibitions, conditions, restrictions, limitations, or clauses prohibitory, irritant, and resolutive contained in any tailzie.

Act 1685 *to remain in force, except as affected by this Act.*

XLVI. That the before-recited Act of the Parliament of *Scotland* passed in the year one thousand six hundred and eighty-five shall be and the same is hereby repealed, to the effect of making the provisions of this Act operative, but no further.

Act not to be defeated by trusts;

XLVII. That where any land or estate in *Scotland* shall, by virtue of any trust-disposition or settlement or other deed of trust whatsoever dated on or after the first day of *August* one thousand eight hundred and forty-eight, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age born after the date of such trust-disposition or settlement or other deed of trust, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such trust disposition or settlement or other deed of trust, or by which the same or the interest of such party therein may bear to be qualified, such prohibitions, conditions, restrictions or limitations being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir, and such party shall be deemed and taken to be the fee simple proprietor of such land or estate, and it shall be lawful to such party to make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the Court to pronounce an Act and decree declaring him fee-simple proprietor of such land or estate, and unaffected by any such conditions, provisions, restrictions or limitations; and the Court shall proceed in such petition as may be just, and shall have power to pronounce an Act and decree declaring such party to be fee-simple proprietor of such land or estate, and unaffected as aforesaid; and such Act and decree may be recorded in the Register of Sasines, and being so recorded shall have all the operation and effect of the most formal and valid disposition to such party, and his heirs and assignees whomsoever, of such lands or estate, with infeftment thereon in favour of such party duly recorded: Provided always, that the rights of the superior of such lands or estate, and of all parties hold-

ing securities thereon, and all rights which are held independently of such trust disposition or settlement or other deed of trust, shall be as they are hereby reserved entire.

Or by liferents;

XLVIII. That from and after the passing of this Act it shall be competent to grant an estate in *Scotland* limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in *Scotland* shall, by virtue of any deed dated on or after the said first day of *August* one thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner and in the like terms and with the like operation and effect as is herein-before provided with reference to an Act and decree of the said Court in the case of deeds of trust: Provided always, that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire.

Or by leases;

XLIX. That where any land or estate in *Scotland* shall, by virtue of any tack, assignation of tack, or other deed or writing dated on or after the said first day of *August* one thousand eight hundred and forty-eight, be held in lease, either directly or through trustees for his behoof, by a party of full age, born after the date of such tack, assignation of tack, or other deed or writing, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such tack, assignation of tack, or other deed or writing, or by which the same, or the interest of such party therein may be qualified, such prohibitions, conditions, restrictions, or limitations, being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir: Provided always, that it shall be lawful to the proprietor of whom such lease is held to enforce any prohibitions, conditions, restrictions, or limitations contained in such tack, assignation of

tack, or other deed or writing which shall have been inserted therein for the *bona fide* purpose of protecting the just rights and interests of such proprietor, in so far as such enforcement may be necessary in order to such protection.

Consents to be in writing, and to be irrevocable.

L. That all consents of heirs of entail, or of their tutors or curators, or other legal guardians, under this Act, shall be in the form of writings duly tested according to the law of *Scotland*, and otherwise in such form as may be fixed by the Court of Session by Act of Sederunt; and no consent duly given in the manner provided by this Act shall be revocable by the granter thereof.

Court may make Acts of Sederunt.

LI. That it shall be lawful to the Court to pass such Act or Acts of Sederunt as the Court may deem proper for the further regulation of the forms of procedure under this Act, and otherwise for rendering this Act more effectual, according to the true intent and meaning hereof.

Interpretation of Act.

LII. That in construing this Act, except where the nature of the provision shall be repugnant to such construction, the words, "Court of Session," or "the Court," shall be construed to mean either Division of the Court of Session; and the words, "heir," and "heir of entail," shall include the institute; and the words, "heir apparent," shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect; the words, "land," and "lands," shall extend to, and comprehend, all heritages; the words, "entailed estate," shall extend to, and comprehend all heritages which, by the law of *Scotland*, may be made the subject of entail; the words, "creditor" and "creditors" shall extend to and comprehend the heirs and assignees of such creditor or creditors; and all words used in the singular number shall be held to include several persons or things; and words in the plural shall be held to include the singular number; and all words importing the masculine gender shall extend and be applied to females as well as males.

Act may be amended, &c.

LIII. That this Act may be amended or repealed by any Act to be passed in the present Session of Parliament.

SCHEDULE to which the foregoing Act refers.

Form of Instrument of Disentail.

At [*state place*] the [*state date*], in presence of [*name notary public*] notary public, and of the witnesses subscribing, I [*name and designation of heir in possession*], heir of entail in possession of the lands and others after mentioned, viz., [*take in full description from titles*], which lands and others are held by me under a deed of entail dated [*state date of entail*], and recorded [*state particulars of registration*], take instruments in the hands of the said notary public subscribing, that the said lands and others are now held by me free from the conditions, provisions, and clauses prohibitory, irritant, and resolutive of the entail, by virtue of the Act [*specify this Act*]; and I consent to the registration hereof in the Register of Tailzies, and also in the books of Council and Session, and others competent, therein to remain for preservation, and thereto constitute
my procurators, *&c.*

In witness whereof I and the said notary public have subscribed this instrument of disentail, [*complete the testing clause in ordinary form*].

[*Signature of heir of entail in possession*].
[*Signature of notary public*], *N. P.*

A. B., witness.
C. D., witness.

FORMS.

I.

DEED OF ENTAIL.

I, A., heritable proprietor of the lands and others after described, for the better preservation of my family and memory, and for certain other weighty causes and considerations, do hereby GIVE, GRANT, and DISPONE to myself and the heirs male of my body, whom failing, to the heirs-female of my body, whom failing to B. and the heirs-male of his body, whom failing to the heirs-female of the body of B. (*insert here the remainder of the destination*), whom failing, to any persons to be named in any deed of nomination to be executed by me at any time during my life, the eldest heir-female and the descendants of her body, excluding heirs portioners and succeeding always without division through the whole course of the female succession, and failing of such nomination or of the persons so to be named and their heirs, then to my own heirs whomsoever and their assignees, ALL and WHOLE [*insert the description of the lands*], with all my right and interest in the lands and others above disponed; BUT ALWAYS with and under the conditions, prohibitions, reservations and provisions after written, *videlicet*, with and under this CONDITION always, that my said whole heirs of entail shall be bound and obliged constantly to bear, use, and retain the surname of A., and arms and designation of A. of C., in all time after their succession to or obtaining possession of my said lands and estate, as their proper surname, arms, and designation: AS ALSO with and under this CONDITION, that the heirs of entail succeeding to me shall be bound and obliged to record these presents in the Register of Tailzies, as also in the Books of Council and Session for preservation and

also to complete their titles under these presents by infeftment, and that within a year and day after my decease, if the heir succeeding shall be within the United Kingdom at the time, and in case he shall be forth thereof, then within year and day after his coming thereto, without prejudice nevertheless to any of the other heirs of entail to apply for recording these presents sooner, if he shall see proper: AND ALSO with and under this CONDITION, that the whole heirs of entail foresaid shall take and possess the lands and estate above disponed under this tailzie only, and upon no other right or title whatsoever, and that they shall use any other title which they or any of them may happen to have or acquire as an additional or collateral title thereto, for supporting this deed of entail only, and for no other purpose whatever: AS ALSO with and under this CONDITION, that my said whole heirs of tailzie shall be obliged to cause *verbatim* insert the whole foresaid destination and order of succession, (at least in as far as shall be subsequent to the heir in possession for the time), in the charters and sasines to follow hereupon, and in all future charters, dispositions, procuratories of resignation, instruments of resignation *ad remanentiam*, precepts of sasine, decrees of special service, and instruments of sasine of the said lands and estate, or any part thereof, and likewise to cause insert in the same, and in all other deeds, instruments and writings relating to the said lands and estate, or any part thereof, the conditions, prohibitions, reservations and provisions herein expressed, or a valid reference to the same, in terms of law: AS ALSO with and under this CONDITION, that in case any of my said heirs of tailzie shall also happen to succeed to and be in possession of the estate of D., the heir so succeeding and being in possession shall be obliged as he is hereby bound and obliged to dispone my said lands and estate to the heir next in succession to him for the time under these presents, who shall not also be the next heir in succession to him in the said estate of D., to the end that my said estate and the estate of D. may not at any time be possessed by one and the same person: AND with and under the PROHIBITIONS following, *videlicet*, under this PROHIBITION that it shall not be lawful to or in the power of my said heirs of tailzie to innovate, alter or infringe this tailzie, or the destination and order of succession hereby established: AND under this PROHIBITION also that it shall not be lawful to or in the power of any of my said heirs of entail to sell, alienate and dispone my said lands and estate, or any part thereof, either irredeemably or under reversion; AND under this prohibition also, that it shall not be lawful to or in the power of my said heirs of entail to contract debts, grant bonds or other deeds or writings, heritable or moveable, or do any other act civil or criminal which

shall be the ground of any adjudication, eviction or forfeiture of my said lands and estate or any part thereof, or any ways affect or burden the same or the rents thereof, to the prejudice of the heirs of entail; nor shall the said lands and estate be affectable by or subject to any terces or courtesies to the wives or husbands of the said heirs of entail, which are hereby excluded; AND under this PROHIBITION also, that it shall not be lawful to or in the power of my said heirs of entail to consent to any special adjudication of the said lands and estate or any part thereof; AND under this PROHIBITION also, that it shall not be lawful to or in the power of my said heirs of entail to set tacks of any part of the said lands and estate for a longer period than twenty-one years, or for a grassum or beneficial interest other than the rent, or under the highest rent that can be got for the time from a good and responsible tenant, or to grant any tacks of the mansion-house, offices, gardens and pleasure grounds of the estate for a longer period than the lifetime of the heir in possession, nor shall it be lawful for any of my heirs of entail to cut down or dispose of any growing wood or timber upon the said estate within one mile of the mansion-house of F., except only such as shall be going to decay, and that upon the warrant of the Sheriff obtained upon an application which shall be served on the next heir of entail in existence, and if such next heir shall be an heir of the body of the applicant, and under age, then likewise upon the next heir of entail of full age, if such there be; and in which application the expediency of the proposed sale or cutting of such wood within the said distance shall be proved: BUT WITH THESE EXCEPTIONS always from the foresaid prohibitions, *videlicet*, with this EXCEPTION, that it shall be lawful to my said heirs of entail to grant feu rights of any part of the said lands and estate, except the mansion-house, offices and policies thereof, for the highest feu-duty that can be got for the same, such feu rights not extending in whole over more than one-tenth part of the said lands and estate according to their value at the time, provided that it shall not be lawful for the heir in possession to take any fine, grassum or other valuable consideration for granting any such feu other than the feu-duty: AND with this EXCEPTION also, that it shall be lawful to my said heirs of entail to provide their wives or husbands, and the wives or husbands of their apparent heirs, in a free yearly annuity out of the rents of the said lands and estate, to be secured by infeftment, in such manner and so that the heir in possession for the time shall have power to burden the rents of the estate for such annuities, to the extent of the yearly sum of £
sterling only, and the amount of such annuities existing at any

one time shall never exceed the sum of £ sterling; but under the provision that any annuity granted in excess shall not be void, but subject only to abatement or suspension, until a prior annuity or annuities shall have expired; AND with this EXCEPTION, that it shall be lawful to my said heirs of entail by bonds affecting the fee and rents of the estate, to provide their children who shall survive the granter, other than the heir who shall succeed to the estate, in competent provisions bearing interest from the day of the granter's death and divisible at his pleasure, or failing an apportionment by him, divisible in equal portions, but under this declaration, that the heir in possession shall have no power to burden the estate for children's provisions to a greater extent than £ sterling, and that the estate shall not be burdened at any one time with such provisions to a larger amount than £ sterling, it being declared, however, that provisions granted in excess of the power or amount competent at the time shall not be void, but subject only to suspension, restriction or abatement, until prior provisions shall have been extinguished in whole or in part, and that if any competent provision shall be granted in the marriage contract of a child, it shall not become void by the predecease of such child before the granter; and declaring that in the event of any child succeeding to the said lands and estate after his provision shall have become payable, but before payment, such provision shall thereupon be forfeited, and if it be a share of a provision, shall be added to the remainder of such provision; AND with this EXCEPTION, that it shall be lawful to and in the power of my said heirs of entail, from time to time as circumstances may require, to lay out in improving the said lands and estate by drainage, planting, building or repairing a mansion-house, offices, farm-buildings, fences, or otherwise as may be approved of by the Court of Session, or the Sheriff of the county where the lands are situated, a sum not exceeding £ sterling yearly, but subject always to the following provision, namely, that the heir in possession proposing to expend money in improvements, and to borrow the amount on the security of the estate, shall give three months' notice of his intention to the next heir of entail after the heirs of his own body, whether of full age or under age, and his guardians if he has any, and within six months after the expiry of the said period of three months, present a petition to the Court of Session, or Sheriff, in which such heir shall be called as respondent, and wherein he may, under suitable restrictions as to the interim investment in trust and due application of the money, obtain authority to borrow the requisite sum on the security of the estate, and expend the same at a rate not exceeding the

foresaid sum of £ *per annum* in improving the said estate, and that at the sight of a person of skill to be appointed by the Court or Sheriff; or otherwise shall obtain authority to the above effect from an arbiter to be named by the heir in possession and the heir next in succession, who may, if of full age, be an heir of the applicant's body, or otherwise of the next heir after the heirs of the body of such heir in possession, or his guardians if under age, and to borrow under suitable restrictions and expend the amount at the sight of such arbiter: AND with and under this PROVISION, that in case my of my said heirs of tailzie shall incur an irritancy, and that the same shall be declared at the instance of the next heir of tailzie in being for the time, and that thereafter a nearer heir shall exist, although descended of the contravener's body, that then, and in that case, the said remoter heir shall be bound and obliged immediately to denude of the right to my said estate in favour of the said nearer heir, subject to all the conditions, prohibitions, reservations, and provisions of this tailzie, RESERVING, nevertheless, to such remoter heir so succeeding, the free rents and proceeds of the said lands and estate from the time of his or her succession, until the existence of such nearer heir, but DECLARING that any liferent, or other provisions to a husband or wife, and provisions to children, which may have been granted by such remoter heir, to affect the said lands and estate or rents thereof, shall cease and determine upon the said nearer heir coming into existence, and the said lands and estate and rents be from thenceforth absolutely freed and disburdened of the same: AND with and under this PROVISION likewise, that in case adjudication or other real diligence shall pass against the said lands and estate, or any part thereof, for payment of any debt which shall be owing by me at the time of my death, or for payment of any real or legal burdens, including those debts and burdens which, by law, or by the terms of this present tailzie, shall affect the fee of my said lands and estate, then, and in every such case, the heirs of entail respectively in possession for the time, shall be bound and obliged to redeem such adjudications, and to disburden my said lands and estate thereof in all time to come, and that within three years from the date of such adjudication; and in case of their failing so to redeem, they shall respectively for themselves, forfeit their right and title to my said lands and estate, in the same manner as if they were naturally dead, and the right thereto shall descend to the next heir of tailzie, who shall have power to establish the same in the manner hereinafter directed, and who, immediately on the lapse of the foresaid three years, shall have right to redeem such adjudications or other diligence, in the

same manner as if they had been deduced against him or herself: And such next heir of entail shall be obliged to redeem the said adjudications or other real diligence within five years of their respective dates, wherein if he or she fail or delay so to do, he or she shall in like manner forfeit all right to the said lands and estate, and the right thereof shall devolve on the subsequent heirs of entail; and it shall be in the power of any of them, whether nearer or remoter, immediately to redeem the said adjudications or other diligence, the nearer heir being always preferred to the remoter, and to make up a title to the said lands and estate, as if all the nearer heirs were naturally dead, and the same shall descend to the heirs of entail called after the heir so making up a title by the foresaid destination and course of succession; AND under this PROVISION, also, that all contraveners are excluded from the management of the said lands and estate, as tutors, curators, or administrators-in-law for the next heirs, or in any other character, and in case the contravener would fall of course to be guardian to a minor heir in possession, in that case, I hereby nominate and appoint the next subsequent heir of tailzie who shall be major and within Great Britain for the time to be tutor and curator to such minor heir; AND under this PROVISION, also, that all my foresaid heirs of tailzie shall be bound and obliged to complete a title by obtaining themselves duly entered with the superiors of my said lands and estate and infeft and seized therein under these presents, within year and day after their succession thereto, and that at the suit of any subsequent heir of tailzie. AND I oblige myself to infeft myself and my said heirs of entail in the order above expressed to be holden *a me vel de me;* AND I RESIGN the said lands and others for new infeftment, but always with and under the conditions, prohibitions, reservations, and provisions above written; AND I ASSIGN the writs; AND I ASSIGN the rents; AND I reserve full power of revocation and alteration, in whole or in part; AND I dispense with the delivery; AND I grant full power and authority to

as my procurators, or to any of the heirs of tailzie foresaid, to cause present this deed of entail before the Lords of Council and Session judicially, and procure the same recorded in the Register of Tailzies, and to expede charters and infeftments thereon agreeably thereto and in terms of law, and that at the expense of the heir of entail in possession for the time; AND I consent to registration hereof, in the books of Council and Session, for preservation; Moreover, I desire any notary public to whom these presents may be presented, to give to myself, whom failing, my said heirs of entail in the order above expressed, sasine of the lands and others above disponed

but always under the conditions, prohibitions, provisions and reservations before specified: IN WITNESS WHEREOF, &c.

II.

Petition for authority to disentail an estate, without consents.

Unto the Right Honourable the Lords of Council and Session, the petition of A. B. Esquire of C.;

Humbly sheweth,

That the petitioner is heir of entail in possession of the entailed estate of C., (*describe the lands shortly*) under a deed of strict entail made and executed by the now deceased D. E. of C. in favour of F. G. his eldest son, and the heirs-male of his body, whom failing (*insert the remainder of the destination*). The said deed of entail is dated the day of 1820, and was recorded in the Register of Tailzies on the day of 1821; and the petitioner is infeft in the said lands and estate as heir of tailzie and provision of the said F. G. in virtue of an instrument of sasine in the petitioner's favour, recorded in the General Register of Sasines at Edinburgh on the day of 1848, proceeding on a precept from Chancery in his favour as heir foresaid, dated the day of 1848.

By the Act of the 11th and 12th of Victoria, cap. 36, intituled (*insert title of Act*) § 3, it is enacted, "That it shall be lawful for any heir of entail (*here quote the remainder of the section*).

That the petitioner is twenty-two years of age, has no heirs of his body, is unmarried, and is the only heir of entail now in existence under the destination in the foresaid deed of entail.

There is produced herewith, in terms of § 6 of the statute, an affidavit by the petitioner setting forth that there are no entailer's debts, or other debts, and no provisions to husbands, widows or children affecting, or that may be made to affect the fee of the said estate, or the petitioner as heir of entail (*if there are debts or provisions, set them forth shortly by names and sums*).

That the petitioner is desirous of disentailing the said lands and estate of C. in virtue of the said statute, and he makes the present application to your Lordships under sect. 33, 34, 35, and 36, of the statute, for authority to execute and cause record in the Register of Tailzies an instrument of disentail in

the form therein prescribed, and as shall be approved of by the Court.

May it therefore please your Lordships to appoint this petition to be intimated in the Minute Book of Court and on the walls of the Outer House, in common form, and likewise to be once publicly advertised in the Edinburgh Gazette, and once weekly for six successive weeks in the *(state any two newspapers fit to be suggested)*; and thereafter on advising the same, with or without answers, to take cognition of the facts above set forth, to interpone your authority to the disentail of the said lands and estate by the petitioner, to authorise him to execute an instrument of disentail thereof in the form to be approved of by your Lordships, and thereafter on such instrument being lodged in process, to authorise the same to be recorded in the Register of Tailzies, all in terms of the said statute; or otherwise to do, as to your Lordships shall seem just.

According to justice, &c.

III.

Petition for authority to disentail an estate, with consents.

Unto the Right Honourable the Lords of Council and Session, the petition of A. B. Esquire of C.;

Humbly sheweth,

That the petitioner is institute of entail in possession of the entailed estate of *(describe the lands shortly)* under a deed of strict entail made and executed by the now deceased D. E. of C., in favour of the petitioner and the heirs-male of his body, whom failing F. G. *(state designation and place of abode)* and the heirs-male of his body, whom failing H. I. *(state designation, &c.)* and the heirs-male of his body, whom failing K. L. *(state designation, &c.)* and the heirs-male of his body *(here insert the remainder of the destination.)* The said deed of entail is dated the day of 1847, and is neither registered nor feudalized.

By the Act of the 11th and 12th of Victoria, cap. 36, intituled *(insert title of Act)* § 3, it is enacted, "That it shall be lawful for any heir of entail *(here insert the remainder of the section)*.

That the petitioner is twenty-four years of age, and has no children. The said F. G. and H. I. have no sons of their re-

spective marriages, and consequently the said F. G., H. I. and K. L. are the three nearest heirs now entitled to succeed to the said estate in their order successively, immediately after the petitioner; and the petitioner has obtained the writs of consent of the said F. G., who is twenty-five years of age, and of the said H. I. and K. L. who are both of full age, to his disentailing the said lands and estate in terms of the said statute, which are produced herewith.*

There is also produced, in terms of Sect. 6. of the statute, an affidavit by the petitioner setting forth that there are no entailer's debts, or other debts, and no provisions to husbands or wives, or children, affecting, or that may be made to affect the fee of the said estate, or the heirs of entail (*or if there are debts, set them forth shortly from the affidavit*).

That the petitioner is desirous of disentailing the said lands and estate, and he makes the present application to your Lordships, under Sect. 33, 34, 35, and 36, of the said Act, for authority to execute and record an instrument of disentail in the form therein prescribed, and as shall be approved of by the Court.

May it therefore please your Lordships to appoint this petition to be served on the said F. G., H. I. and K. L., and them to lodge answers thereto within a certain short space; and also to appoint the same to be intimated (*complete the prayer as on p.* 212.)—According to justice, &c.

IV.

Petition for Excambion, under the Rutherfurd Act.

Unto the Right Honourable the Lords of Council and Session, the petition of A. B. Esquire of C.;

Humbly sheweth,

That the petitioner is heir of entail in possession of the entailed estate of C. (*describe the lands shortly, and state the title, &c., as on p.* 211 *or* 212).

By the Act of the 11th and 12th of Victoria, cap. 36, enti-

* *Note.*—If the two subsequent heirs are in minority, the names, &c. of guardians must be stated as required by § 33. But no power of consenting is given to any guardians, except those named by the Court under § 31.

tuled (*insert title of Act*) § 5, it is enacted, "That it shall be lawful for any heir of entail being of full age (*complete the quotation of the Section.*)

The petitioner is fifty years of age, and D. E., (*state designation and place of abode*), his eldest son and apparent heir under the said entail, is twenty-six years of age, and F. G., eldest son of the said D. E., (*state place of abode*) is in pupillarity, and has no guardians other than the said D. E., his administrator-in-law. The said D. E. and F. G. are the heirs who, in order successively, are and would on survivance, be heir apparent to the petitioner under the said entail; and the petitioner has obtained the consent to this application of the said D. E., as appears from his writ of consent produced herewith. The said D. E. and F. G. are likewise the heirs of entail with whose consents the petitioner might competently disentail the said estate.

The object of this application is to obtain the sanction of your Lordships to an excambion of the lands and farm of M., part of the said estate, with the lands of N., belonging in fee-simple to the petitioner, as agreed to by the said D. E.

The said lands of N. exceed in value the said lands of M., proposed to be given from the entailed estate.

There is produced herewith, in terms of § 6. of the statute, an affidavit by the petitioner, setting forth that the following entailer's debts affect the fee of the said estate, *videlicet*, (*here insert the names and sums from the affidavit*). There are no other debts, and no provisions to husbands, widows or children, affecting or which may be made to affect the fee of the said estate.

The petitioner therefore makes the present application to your Lordships under sects. 31, 33, 34, 35 and 36 of said Act, for the appointment of a tutor *ad litem*, to the said F. G., and on the tutor to be so appointed consenting to the proposed transaction, for authority to execute an excambion of the said lands and farm of M., with the said lands of N.

May it therefore please your Lordships to appoint this petition to be served on the said D. E. and F. G., and them to lodge answers thereto, within a certain short space, and also to appoint the same to be intimated, (*as on p.* 212); and to nominate and appoint H. L., or some other fit and proper person, to be tutor *ad litem* to the said F. G., with the powers mentioned in § 31 of the statute; and thereafter, on advising this petition with or without answers, to take cognition of the facts above set forth, to remit to one or more persons of skill to ascertain and report upon the respective values of the said lands; and on its appearing by their report, that the value of the said lands

of N. exceeds or is at least equal to the value of the said lands of M., to interpone your authority to the excambion of the said lands and farm of M., part of the entailed estate, with the said fee-simple lands of N., by a contract of excambion to be approved of by your Lordships, containing an entail of the said lands of N. on the petitioner and the heirs substituted to him as aforesaid, and under the conditions, provisions, prohibitions and clauses irritant and resolutive of the said entail of the estate of C.; and on such contract being lodged in process, duly executed, to authorise and appoint the same to be recorded in the Register of Taillies, * and infeftment to be completed thereon, and thereafter to decern and declare the transaction to be completed in terms of the statute; or otherwise to do as to your Lordships shall seem just.—According to justice, &c.

V.

Petition for authority to grant Bond of Annualrent for an Improvement Debt.

Unto the Right Honourable the Lords of Council and Session, the Petition of A. B., Esq. of C.;

Humbly sheweth,

That the pursuer is heir of entail in possession of the entailed estate of C., (*describe the lands and estate, and state the title, as exemplified and p.* 211 *and* 212).

That on the day of 1840, the petitioner obtained decree of declarator before this Court, against D. E., Esq., the heir under the foresaid entail entitled to succeed to the petitioner in the said lands and estate, next after the heirs of his own body, in terms of the Act of the 10th George III. cap. 51, entituled, "An Act to encourage the improvement of lands, tenements and hereditaments in that part of Great Britain called Scotland, held under settlements of strict entail," for the sum of £ sterling, being three fourth parts of the sum of £ , expended by the petitioner on improvements on the said estate under the said statute.

That the yearly rent and produce of the said estate was found by the said decree to amount, after making the deductions required by the said statute, to the sum of £ at least.

* *Note.*—Much caution will be necessary in this kind of excambion, as the Act does not contain the provision of the Rosebery Act, that the acquired lands shall not be subject to the debts of the heir in possession between the dates of executing the contract and recording it in the Register of Tailzies.

That by the Act of the 11th and 12th of Victoria, cap. 36, intituled, (*state title of Act*), § 13, it is enacted, "that where an heir of entail" (*here quote the section*).

That F. G., H. I., and K. L. (*state designations and places of abode*) are the three nearest heirs now entitled to succeed to the said estate, in their order successively after the petitioner, under the said destination, and with whose consents the petitioner might competently disentail the said estate. The said F. G. is twenty-six years of age, and the said H. I. and K. L. are in pupillarity, and have no guardians other than the petitioner, their administrator-in-law.

That the petitioner is desirous to avail himself of the provisions of the said last recited Act, by executing a bond of annual-rent over the said estate, and binding himself for the legal interest of the said sum of £ , payable during the petitioner's lifetime, and himself, and his heirs under the said entail for twenty-five years after his death, for an annual rent not exceeding £7, 2s. *per cent.* of the said sum of £ , and that in favour of any party willing to transact with the petitioner in the premises, payable the said interest or annual payment half-yearly at the terms of Whitsunday and Martinmas, beginning the first term's payment of the said interest at the first term of Whitsunday or Martinmas after the date of the bond to be granted by the petitioner, and the first term's payment of the said annual rent of £7, 2s. *per centum*, at the first term of Martinmas or Whitsunday next after the death of the petitioner; and he makes the present application under sect. 33, 34, 35 and 36 of the Act, for the authority of your Lordships to the said transaction.

May it therefore please your Lordships to appoint this petition to be served on the said F. G., H. I., and K. L., and also to be intimated (*as on p.* 212); and thereafter, on advising the same with or without answers, to interpone your authority to the proposed transaction, and authorise the petitioner to execute in favour of any party willing to transact with him, a bond of annual rent for the legal interest of the said sum of £ during the petitioner's lifetime, and after his death, for £7, 2s *per centum* on that sum for a period of twenty-five years, payable half-yearly at the terms of Whitsunday and Martinmas, beginning the first term's payment of the said interest and of the said annualrent respectively, as above mentioned, with legal interest and penalties, in case of failure; or to do otherwise as to your Lordships shall seem just.

According to justice, &c.

VI.

Petition for Warrant of Sale, for payment of Entailer's Debts.

Unto the Right Honourable the Lords of Council and Session, the petition of A. B. Esquire of C.;

Humbly sheweth,

That the petitioner is heir of entail in possession of the entailed estate of C. (*describe the lands shortly, and state the title as exemplified at pp.* 211, 212).

That by the Act of the 11th and 12th Victoria, cap. 36, intituled (*state title of Act*), sect. 25, it is enacted, "That in all cases in which it is made competent, (*complete the quotation of sect.* 25).

That the following debts form charges against the fee of the said estate, videlicet (*state shortly the sums, and how constituted, and the names of the creditors*), as more fully expressed in the Schedule in the Appendix.

That the petitioner is desirous of availing himself of the above provisions of the statute, and he makes the present application to your Lordships, under sect. 33, 34, 35 and 36 of the said statute, in order that the true amount of the debts affecting the fee of the said estate may be ascertained, and such part of the said estate sold by public roup after due advertisement, under the authority of your Lordships, as may be selected as most suitable and proper, dispositions granted by the petitioner to the purchasers, the price applied in extinction of the said debts, and the surplus, if amounting to or exceeding £200, reinvested under the fetters of the said entail, in favour of the petitioner and the heirs of tailzie called after him by the said destination, or if under the said amount, paid to the petitioner for his own use and behoof, all as more fully expressed in the Act.

That D. E., F. G. and H. I. (*state names, places of abode, and designations*), are the three next heirs of entail under the said destination, with whose consents the petitioner might disentail the said estate, and the said D. E. is upwards of twenty-five years of age, and the said F. G. and H. I. are of full age.

May it therefore please your Lordships to appoint this petition to be served on the said D. E., F. G. and H. I., and on the said creditors (*names of creditors*), and them to lodge answers thereto within a certain short space, and also to appoint the same to be intimated (*as on p.* 212); and thereafter, on advising this petition with or without answers, to

take cognition of the facts above set forth, and the amount of the debts charged against the fee of the said entailed estate as aforesaid, to select such parts of the same other than the mansion-house, offices and policies thereof, as shall seem most suitable and proper to be sold and disposed of for the purpose of paying off the said debts, and to authorise the same to be advertised and sold by public roup, in the manner, in the lots and at the upset price or prices to be approved of by your Lordships; to authorise the petitioner to grant dispositions in fee-simple to the purchasers thereof, and to discharge them of the price on consigning the same under the orders of the Court; to authorise and direct such price or prices to be allocated and paid to the creditors in the said debts, on executing and delivering valid and sufficient discharges for the same; to authorise and direct the reinvestment of any balance of the said price amounting to or exceeding £200, in other lands and heritages under the fetters of the said entail, and in favour of the petitioner and the heirs following him in the said destination, or if under £200, to grant warrant for payment of such surplus to the petitioner; or otherwise to do in the premises as to your Lordships shall seem just.—According to justice, &c.

VII.

Petition for Excambion under the Rosebery and Rutherfurd Acts.

Unto the Right Honourable the Lords of Council and Session, the petition of A. B. Esquire of C.;

Humbly sheweth,

That the petitioner is heir of entail in possession and infeft in the lands and estate of C. (*describe the lands shortly*), under the following titles, videlicet, (*recite the deed of entail and destination, and the titles of the existing investiture as exemplified on p.* 211).

That by § 3 of an Act of the 6th and 7th of William IV. cap. 42, intituled, "An Act to grant certain powers to heirs of entail in Scotland, and to authorise the sale of entailed estates for the payment of certain debts affecting the same," it is enacted, "that notwithstanding any prohibitory, irritant and resolutive clauses," (*complete the quotation of the section*). By § 5 it is further enacted, "that all contracts of excambion," (*complete the quotation of the section*).

That by an Act of the 4th and 5th of her Majesty, cap. 42, being an Act to amend the foresaid Act, § 1, it is enacted, "that it shall not be necessary to insert in any contract of excambion, (*complete the quotation of the section*).

That by an Act of the 11th and 12th of her Majesty, cap. 36, intituled, "An Act for the amendment of the law of entail in Scotland," § 37, it is enacted, that "whereas by the said recited Act," (*complete the quotation of the section*).

That the petitioner is desirous to avail himself of the above provisions of the said several Acts, for the purpose of effecting an excambion of that part of the said entailed estate known by the name of D., lying bounded and described as follows, (*insert description of the lands proposed to be given from the estate*), with the lands of E., (*insert description of the lands proposed to be acquired*). The said lands of E. belong in property to F. G. Esquire of H., and are more suitable to be held as part of the said entailed estate than the lands of D., as being nearer the mansion-house and centre of the estate, (*here state the circumstances which prove the expediency of the exchange, and whether there is any and what excess in value in the one case or the other, not exceeding* £200.)

That I. K., L. M. and N. O. (*state designations and places of abode*), are the three heirs of entail under the said destination, next after the petitioner, and with whose consents he might competently disentail the said estate. The said I. K. is twenty-five years of age, and the said L. M. and N. O. are in minority, and P. Q., and R. S., (*state designations and places of abode*), are curators of the said L. M., and T. U., and V. W., (*state designations and places of abode*), curators of the said N. O.

The petitioner therefore makes the present application under sect. 33, 34, 35 and 36 of the last recited Act, in order that your Lordships may be pleased to remit to persons of skill to inspect and adjust the value, and settle the marches of the lands and others proposed to be excambed, and thereafter, on receiving their report on oath, to authorise the preparation, execution and recording of a contract of excambion in terms of the said statutes. *

May it therefore please your Lordships to appoint this petition to be served on the said I. K., L. M., and N. O., and the curators foresaid of the said L. M. and N. O., and them to answer the same within a certain short space, and also to appoint the same to be intimated (*as on p.* 212); and thereafter, on advising the same with or without answers, to remit to two or more skilful persons to inspect and adjust the value, and settle the marches of the lands and others proposed to be excambed, and upon receiving the report

* See *note* p. 215.

on oath of such persons, and being satisfied of the expediency of the proposed excambion, to pronounce judgment authorising the same; and thereupon to authorise a contract of excambion to be prepared and executed, and on the same being lodged in process, duly executed, to appoint the same to be recorded, within three months of its date, in the Register of Tailzies, all in terms of the said statutes; or to do farther, or otherwise, as to your Lordships shall seem proper.—According to justice, &c.

VIII.

Bond of Annualrent.

I, A. B., esquire of C., heritable proprietor of the lands and others herein-after described, considering that upon the day of 1848, I obtained decree of declarator at my instance before the Lords of Council and Session, against C. D., the heir of entail in the said lands and estate entitled to succeed to me therein next after the heirs of my own body, under a disposition and deed of entail dated the day of 1780, recorded in the Register of Tailzies, the day of 1790, and in the books of Council and Session, the day of 1791, by which decree it was found and declared that in terms of the Act of the 10th George III. cap. 51, intituled, "An Act to encourage the improvement of lands, tenements and hereditaments, in that part of Great Britain called Scotland, held under settlements of strict entail, I had laid out in enclosing, planting and erecting farmhouses and offices on the said estate, (of which the yearly rent or produce after making the statutory deductions therefrom, amounted to the sum of £500 sterling at the least), the sum of £1200 sterling, and having duly complied with the forms prescribed by the statute, I was by the said decree constituted a creditor against the succeeding heirs of entail, for the sum of £900 sterling, being three-fourth parts of the said amount of expenditure; that farther, in terms of an Act of the 11th and 12th of Victoria, cap. 36, § 13, intituled (*state title of Act*), I presented a petition to the said Lords, setting forth the terms of the said decree, and that I was desirous to avail myself of the provisions of the last mentioned Act by granting bond of annualrent in manner aftermentioned to any person willing to transact with me in the premises under the statute, and praying the said

Court to interpone their authority to the proposed transaction; in which application the said Court, on the day of 184 , pronounced decree in terms of the prayer of the petition: AND NOW SEEING that E. F. has instantly made payment to me of the foresaid sum of £900, whereof I acknowledge the receipt: THEREFORE, in consideration of the said payment, I bind and oblige myself and my heirs of entail in the lands and others herein-after described as follows; *videlicet*, I bind and oblige myself and my heirs, executors and successors whomsoever, to make payment to the said E. F. and his heirs and assignees, of an annualrent of £45 sterling, or such other annualrent or interest during my life as shall by law for the time correspond to the said sum of £900, payable at the terms of Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of next, for the period between the date hereof and the said first term of payment, and the next term's payment at thereafter, and so forth, at the said two terms during the whole period of my life, and paying the proportion of the said annualrent which shall fall due between the term of Whitsunday or Martinmas immediately preceding my death and the day of my death inclusive, on the day of my death, with a fifth part more of each termly or proportional payment, of liquidate penalty, in case of failure in punctual payment thereof, and the legal interest of each termly or proportional payment of the said annualrent, from the date on which the same becomes due during the not payment thereof; AND for farther security to the said E. F. and his foresaids, I BIND and OBLIGE myself to infeft and seize the said E. F. and his heirs and assignees heritably, in an annualrent of £45 sterling, or such other annualrent or annual-interest during my life, as shall by law correspond to the foresaid sum of £900, to be uplifted and taken yearly by equal portions, at the terms of Whitsunday and Martinmas, beginning the first term's levying thereof at the term of next, for the period between the date of these presents and the said first term of payment, and the next term's levying thereof at thereafter, and so forth at the said two terms during the whole period of my life, and levying the proportion of the said annualrent which shall fall due between the term of Whitsunday or Martinmas immediately preceding my death, and the day of my death inclusive, on the day of my death, with liquidate penalties and interest as before specified, furth of ALL and WHOLE the following lands and others, *videlicet*, (*here insert the description of the lands*), or furth of any part or portion of the said lands and others, readiest rents, profits and duties of the same; and also in all and whole the said lands and others themselves; and that in real security and for more sure payment

to the said E. F. and his foresaids of the said annualrent or annual interest, liquidate penalties and interest above specified, if incurred: AND FARTHER, I BIND and OBLIGE myself and the heirs of entail succeeding to me in the foresaid lands and others under the said deed of entail to make payment to the said E. F. and his foresaids, of an annualrent of L.7, 2s. sterling for every L.100 of the said sum of L.900, for each and every year of the full period of twenty-five years after the day of my death and no longer, payable yearly during the said period by equal portions, at the foresaid terms of Whitsunday and Martinmas, beginning the first term's payment thereof at the term of Whitsunday or Martinmas which shall happen first after my death, for the period between the day of my death and such term, and the next term's payment at the following term of Martinmas or Whitsunday, and so forth at the said two terms during the said period of twenty-five years and no longer, and paying the proportion of the said annualrent for the period between the last termly payment thereof and the day being the last day of the twenty-five years, corresponding to the day of my death, upon such day, with liquidate penalties and interest as before specified: AND for their further security and more sure payment, I BIND and OBLIGE myself and my said heirs of entail to infeft and seize the said E. F. and his foresaids heritably, in an annualrent of L.7, 2s. sterling for every L.100 of the said sum of L.900, for every year of the full period of twenty-five years after the day of my death, and no longer, to be uplifted and taken yearly during the said period by equal portions, at the foresaid terms of Whitsunday and Martinmas, beginning the first term's uplifting thereof at the term of Whitsunday or Martinmas which shall first happen after my death, for the period between the day of my death and such term, and the next term's uplifting thereof at the following term of Martinmas or Whitsunday, and so forth at the said two terms during the said period of twenty-five years and no longer, and levying the proportion of the said annualrent for the period between the last termly payment thereof and the day corresponding to the day of my death, being the last day of the said twenty-five years, upon such day, with liquidate penalties as above specified; FURTH of ALL and WHOLE the lands and others above described, and here held as repeated *brevitatis causa*, or furth of any part or portion thereof, and readiest rents, profits and duties of the same; and also in all and whole the said lands and others themselves; and that in real security and more sure payment to the said E. F. of the said annualrent, liquidate penalties and interest if incurred; such respective infeftments to be by two several infeftments and manners of holding, namely, the said re-

spective annualrents and lands, to be holden either of me and my foresaids, both in free blench for payment of a penny Scots on the ground of the said lands at Whitsunday yearly in name of blench farm if asked only, or from us and our immediate lawful superiors of the said lands, in the same manner and as freely in all respects as we hold or might have holden the same ourselves, and that either by resignation or confirmation or both, the one without prejudice of the other: AND I oblige myself and my said heirs of entail to grant all necessary deeds for accomplishing the said infeftment by resignation: AND I oblige myself and my respective foresaids to warrant these presents, and the infeftment to follow hereon at all hands, AND also to receive the said E. F. and his foresaids as vassals to us in the said annualrent or lands, without any composition: AND I assign to the said E. F. and his foresaids, the rents, maills and duties of the said lands and others, from and after the date hereof, and also the writs and title-deeds thereof, but to the effect of supporting their title to the same only; and I oblige myself and the said heirs of tailzie for the expenses of assigning and discharging this security: AND it is hereby declared that in case the said E. F. or his foresaids, shall think fit to enter into possession of the said lands and others, or to levy the rents, maills and duties of the same or any part thereof, either by virtue of the real security to be completed hereon, or the above assignation to the same, they shall be liable to account only for their actual intromissions according as the same shall be instructed by their writ or oath, and not for omissions or neglect of diligence or for the insolvency of tenants, and that they may cease from and again resume the possession of the said lands and others from time to time as they shall find convenient, and they shall, during their possession, have allowance for all public, parochial and local burdens affecting the said lands and others or the rents of the same, or any part thereof: AND I consent to the registration hereof in the books of Council and Session or others competent, for preservation, and that letters of horning and all lawful execution on six days may pass upon a decree to be interponed hereto, and for that purpose constitute my procurators: MOREOVER, I desire any notary public to whom these presents may be presented, to give to the said E. F. and his foresaids, sasine of the said respective annualrents and of the lands and others above described in security thereof, under the limitations foresaid. IN WITNESS whereof, &c.

IX.

Bond and Disposition in Security.

I, A. B., Esquire of C., heritable proprietor of the lands and others herein-after described; CONSIDERING, (*state the terms of the decree of declarator as exemplified on* p. 220), that farther, in terms of an Act of the 11th and 12th of Victoria, cap. 36, § 18, I presented a petition to the said Lords, setting forth the terms of the said decree, and that I was desirous to avail myself of the provisions of the last mentioned Act, by granting bond and disposition in security, in manner after-mentioned, to any person willing to transact with me in the premises, and praying the said Court to interpone their authority to the proposed transaction, in which application the said Court on the day of pronounced decree in terms of the prayer of the petition: AND NOW SEEING that E. F. has instantly made payment to me of the sum of £600 sterling, being two-third parts of the said sum of £900, of which sum of £600, I hereby acknowledge the receipt: THEREFORE I bind and oblige myself and the heirs of entail succeeding to me in the lands and estate herein-after disponed under the foresaid tailzie, to repay to the said E. F. and his heirs and assignees whomsoever, the said principal sum of £600, at the term of next, with the sum of £120 sterling of liquidate penalty in case of failure in payment, and the legal interest of the said principal sum from the date hereof to the foresaid term of payment, and half-yearly, termly and proportionally thereafter, during the not-payment, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next to come, for the interest due preceding that date, and the next term's payment thereof at following, and so forth half-yearly, termly and proportionally thereafter, during the not payment of the said principal sum, with a fifth part more of the interest due at each term, of liquidate penalty in case of failure in punctual payment thereof: AND in security of the personal obligation before written, I DISPONE to and in favour of the said E. F. and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, ALL and WHOLE (*here describe the lands, &c. and except the mansion-house, offices and policies*), and that in real security to the said E. F. and his foresaids of the whole sums of money above written, principal, interest and penalties; AND I ASSIGN the rents; AND I ASSIGN the writs; AND I grant warrandice; AND I reserve power

of redemption; AND I oblige myself and my heirs of entail in the said estate for the expenses of assigning and discharging this security; AND on default in payment I grant power of sale; AND I consent to registration for preservation and execution, and also to registration in the General or Particular Register of Sasines.—IN WITNESS whereof, &c.

X.

Contract of Excambion under the Act of 1848.

It is CONTRACTED and AGREED between the parties following, *videlicet*, A. B., Esquire of C. on the one part, and D. E., Esquire of F. on the other part, in manner underwritten; that is to say, the said parties considering that the said A. B. as heir of entail in possession and heritable proprietor of the entailed estate of C., presented an application to the Lords of Council and Session under the Act of the 11th and 12th Victoria, cap. 36, intituled (*state title of Act*) § 4 and 5, with the consents required by the statute, for the purpose of obtaining the authority of the Court to the excambion and sale hereby made, in which the Lords of the Division of the said Court, on the day of 1848, interponed their authority to the proposed excambion, and remitted to G. H. writer to the Signet to revise and adjust the contract and to report; and thereafter, on advising a report by the said G. H., the said Lords approved of the draft contract, and authorised the same to be engrossed and executed: THEREFORE, the said D. E., heritable proprietor of the lands and others first herein described, SELLS and DISPONES from himself and his heirs and successors, to and in favour of the said A. B. and the heirs of entail after mentioned, being the heirs substituted to him in the destination contained in a deed of entail executed by G. H. Esq. of C., dated the day of 17 , and recorded in the Register of Tailies, the day of 18 , *videlicet*, (*insert the destination*), ALL and WHOLE, (*here insert the description of the lands*), with all the said D. E.'s right and interest in the said lands and others, with entry at the term of ; but always with and under the conditions, provisions, reservations and clauses prohibitory, irritant and resolutive contained in the said deed of entail, which are as follows, *videlicet*, (*here insert the conditions, &c. of the original entail*): IN CONSIDERATION whereof, and of the sum of £ , agreed to be paid by the said D. E. to the said A. B., as money price equivalent to the excess

in value of the lands and others in the second place hereby disponed, over the lands and others above disponed, the said A. B. SELLS and DISPONES from himself and the heirs of entail substituted to him in the deed of entail above mentioned, to and in favour of the said D. E. and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE, (*insert the description of the lands given from the entailed estate*), with all the right and interest of the said A. B. and his heirs of entail foresaid in the said lands and others, with entry at the said term of : PROVIDING, that if either of the lands above disponed or any part thereof, shall be evicted on account of any fact or deed of the disponer or of his predecessors or authors, or of a defect in his title, then and in any of these cases, this contract and the sasines to follow hereon shall be null and void, and it shall be competent for the party from whom the lands shall be so evicted, to recover and resume the possession of the lands disponed, or the lands disponed and price paid by him, and the action for that purpose shall be competent to as well as against the singular successors of the parties contracting: AND both parties reciprocally oblige themselves to infeft and seize each other and their foresaids, to be holden *a se vel de se:* And they reciprocally resign the said lands and others for new infeftment, but always with and under the conditions, provisions, and clauses prohibitory, irritant and resolutive before written, as respects the lands and others in the first place above disponed: AND the parties reciprocally assign the writs, and have delivered the same according to inventory: AND they reciprocally assign the rents: AND they reciprocally bind themselves to free and relieve one another and their respective foresaids, of all feu-duties, casualties, and public burdens: AND they reciprocally grant warrandice: AND they consent to registration hereof for preservation: MOREOVER, they reciprocally desire any notary public to whom these presents may be presented, to give to the other and his foresaids sasine of the respective lands and others above disponed, but always with and under the conditions, provisions, and clauses prohibitory, irritant and resolutive before written, as respects the lands and others first above disponed. IN WITNESS WHEREOF, &c.

XI.

Contract of Excambion under the Rosebery Act, and the Act of 1848.

It is contracted and agreed between the parties following, *videlicet*, A. B., Esquire of C., on the one part, and D. E., Esquire

of F., on the other part, in manner underwritten, that is to say, the said parties considering that the said A. B., heritable proprietor in possession of the entailed estate of C., presented an application to the Lords of Council and Session, under the Act of the 6th and 7th of William the IVth, cap. 42, entitled (*state title of Act*), the Act of the 4th and 5th of Victoria, cap. 24, entitled, (*state the title*), and the Act of the 11th and 12th of Victoria, cap. 36, entitled (*state the title*), in which petition, after intimation had been given and service made on the three next heirs of entail in terms of the last mentioned Act, the Lords of the Division remitted to G. H. and I. K., land valuators, to inspect and adjust the value and settle the marches of the lands and others proposed to be excambed, and thereafter, on advising the report upon oath of the said valuators and being satisfied of the respective values of the lands as after-mentioned, the said Lords on the day of pronounced judgment authorising the excambion, and remitted to L. M., writer to the Signet to revise and adjust the draft of the contract, and to report; and on considering the report of the said L. M., the said Lords approved of the draft contract as revised, and appointed the same to be engrossed and executed: THEREFORE the said D. E. SELLS and DISPONES from himself and his heirs and successors, to and in favour of the said A. B. and the heirs of entail substituted to him according to the destination contained in a deed of entail of the said lands of C. executed by the now deceased N. O. Esquire, dated the day of and recorded in the Register of Tailzies the day of , ALL and WHOLE (*insert the description of the lands*), with all the said D. E.'s right and interest in the said lands and others, with entry at the term of next; but always with and under the conditions, provisions, reservations and clauses prohibitory, irritant and resolutive contained in the said original deed of entail: IN CONSIDERATION whereof, and of the sum of £50 sterling, being the excess of value of the lands and others herein-after disponed over the lands and others above disponed as reported by the said valuators, the said A. B. SELLS and DISPONES from himself and the heirs of entail substituted to him in manner foresaid, to and in favour of the said D. E. and his heirs and assignees whomsoever, ALL and WHOLE (*insert the description of the lands*), with all the right and interest of the said A. B. and his foresaids in the said lands and others, with entry at the said term of : PROVIDING that if either of the lands (*complete the deed according to the form on p.* 226, *but with mention of the conditions, &c. of the entail as "before referred to," in place of "before written."*)

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